8° S-28-Jur.

A Compendious Collection of the LAWS of ENGLAND,

Touching Matters Criminal.

Faithfully collected and Methodically digested, not only for the use of Sheriffs, Justices of the Peace, Coroners, Clerks of the Peace *and others within that Verge; but of* all the People *in general.*

By *J. B. Esq.* Brydall.

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Maximæ Dignationis,

Ac quondam Coll. Regin.

IN ACAD. OXONIENSIS

Alumnis Ornatiſſimis,

Domino Joſepho Williamſon *Equeſtris & Senatorii Ordinis Socio Digniſſimo, M. Monarchæ ſemper Aug. ſimulac Clementiſſim. noſtri D. D.* Caroli Secundi *Primicerio, eidemque Sereniſſimo Principi ab intimis ſuis Conſiliis.*

Thomæ Lamplugh *S. T. D. Eccleſiæ Roff. Decan. Archidiac.* Londinenſi, *ac S. R. M. a Sacris Domeſticis,*

Necnon

D. Roberto Southwell, *Militi Aurato, S. R. M. Britanniæ in Sanctiori ſuo Conſilio Secretario, in Conceſſu Ordinum totius Regni Senatori graviſſimo.*

TRACTATULUM HUNC

De Jure ac Judicio Criminis non ſimulate, ſed vere ex animo conſecrat, Collegii Præfati olim etiam Alumnis, atque amplitudini

N N. ſuorum nunc Servus Devotiſſimus

J. B.

J. B. V.

JUS CRIMINIS:
OR THE
Law of ENGLAND,
TOUCHING
Matters Criminal.

JUS CRIMINIS, or the Obligation of Crime, is whereby a Subject for a Delict, or Offence againſt the Imperial Crown of *England*, is obnoxious, and liable to puniſhment. And a delict, or offence is, whereby the *King*, and Common-wealth (which make but one) are injured.

Of Offences, commonly termed Pleas of the Crown, ſome are perpetrated mediatly againſt the Crown (though not principally, yet conſequentially;) And ſome immediatly are ſaid to be committed againſt the *King* Himſelf, who is Head of the Common-wealth, and in whom all general Injuries reſide, and to whom the Reformation of all Publique wrongs doth inſeperably appertain.

The former kind may be divided into 3 Claſſes, (*viz.*)

1. Into thoſe that have Relation to life it ſelf, ſuch as *Homicide*.

2, Into those that respect the Body and Members, as Battery, Mayhem, and Rape.

3. Into those that belong to Dominion, or property, such as Theft, and burning of Houses.

The *latter kind* do comprehend High-Treason, Misprision of Treason, Robbing the *King*'s Treasure, Bribery, Extortion, striking in any of the *King*'s *Courts*, where *He* resides Personally, or by Representation, and all manner of Breaches of the Publique Peace; such as Conjurations, Routs, Ryots, Affrayes, Duels, Lybels, and false Rumours. *Of these several kinds in their Order.*

1. *Of those Crimes that are committed mediatly*, contra Coronam & dignitatem Regis, *and do relate to Life it self, as* Homicides.

In *Homicide*, are worthy of Observation, the Etymologie of it, and its general Division.

Lib. 3. c. 4. nu. 3. de corona.

Est homicidium, sayes *Bracton*, *hominis Occisio*, *ab homine facta*, *si enim a Bove*, *Cane*, *vel alia re non dicetur proprie Homicidium*, *Est dictum Homicidium*, *ab homine*, *& Cædo*. *quasi hominis Cædim* : And with *Bracton* doth Concurre in this matter, another antient Author *viz.* Mr. *Horne*, whose very words are these: *Homicide est Occision de Home per Home fait*, *car si soit per beste*, *ou mischeance nest Homicide*. Thus much of the Definition, and Origination of the word *Homicide* : As for the right division of *Homicide*, take this as followeth : Of *Homicides* some be done.

Mirror. c. 1. Sect. 9.

1. *Proposito*, voluntarily, and of malice forethought, as petty-Treason, and Murther,

2. *Impetu*, voluntarily, and not of malice fore-

fore-thought: Of theſe ſome be Felony, as Man-ſlaughter, and ſome be no Felony; Of which, ſome be in reſpect of giving back inevitably in defence of himſelf, upon an aſſault of Revenge; and ſome without any giving back, as upon the Aſſault of a Thief, or Robber, upon a man in houſe, or abroad. Some upon the Aſſault of one, that is under Cuſtody, as the Sheriff, or Gaoler aſſaulted by his priſoner; ſome in reſpect that he is an Officer, or Miniſter of Juſtice, without any aſſault in Execution of his Office or Lawful warrant. Co. 3. Inſt. f. 54.

3. *Caſu*, ſuch as be no Felony, neither forethought, nor voluntary, as Man-ſlaughters by miſadventure. Having ſhewed the Reader Sr. *Edward Cook*'s diviſion of *Homicide*; I begin with the firſt Branch, *viz.* *Homicide* voluntary, and of malice fore-thought, and this conteines petit Treaſon, and Murder.

Treaſon (being derived from *Trahir*) which is treacherouſly to betray, *Traitre* betrayed, and *Trahiſon per Contractionem*, Treaſon is the betraying it ſelf, it is divided into two parts, into High Treaſon, and petit Treaſon: It is called High, or Grand Treaſon in reſpect of the Royal Majeſty againſt whom it is perpetrated, and Comparatively it is ſtiled petty Treaſon, in reſpect it is committed againſt Subjects, and inferior perſons; ſo that this petit Treaſon is when wilful Murder (in the Eſtate *Oeconomical*,) is committed upon any Subject, by one that is in ſubjection, & oweth Faith, Duty, and Obedience to the party Murdered; as in theſe three Caſes following, which are only 1 Petit Treaſon. Co. 3. Inſt. f. 4. & 20.

mentioned by the Statute of 25. *E.* 3. *C.* 2. *de prodicionibus*; and likewiſe by *Britton Cap.* 8. & 22.

1. When a ſervant ſlayeth his Maſter: This was petit Treaſon by the *Common Law*, for it appeareth by the Book 12. *Aſs.* that a woman ſervant killed her Mrs, wherefore ſhe had Judgment given to be burned, which is the Judgment at this day of a woman for petit Treaſon. And herewith agreeth 21 *E.* 3. 17.

12 Aſſ. pl. 30.

Upon the Act aforeſaid, if the ſervant kill the wife of his Maſter, it is petit Treaſon, for he is ſervant both to the Husband and wife.

19 H. 6. 47.

A ſervant upon malice pretended, ſhooteth at a ſtranger and miſſeth him, and killeth his Maſter, being by; this is petit Treaſon in the ſervant (though he intended no hurt to his ſaid Maſter yet) becauſe he intended Murther thereby.

Plowdens Com. 86. b. Crompt. 20.

A Servant commands one to beat his Maſter, and he killeth him, this is petit Treaſon in the ſervant if he be preſent.

Crompt. 20.

If a ſervant has an intent to kill his Maſter, and before the Execution of his purpoſe, departeth out of his Maſters ſervice, and being out of his ſervice, put his Intent in Execution, aud kills him, who was his Maſter; this is petit Treaſon: for the Execution of the Act, hath a Retroſpection to the Original Cauſe, which was malice conceived when he was a ſervant.

Co. lib. 1. Shellies caſe 99b. 20. H. 6. 47. Plowdens. Com. 260. Co. 3. Inſt. f. 20.

A maid-ſervant conſpires to kill her Miſtreſs, it is petit Treaſon in her, and Murder in the Actor.

Moores Reports. nu. 227. f. 91.

2. When

2. When a Wife ſlayeth her Husband.

The wife malicioufly killeth her Husband, this is petit Treaſon in her: But if the Husband malicioufly killeth his Wife, this is only Murther: the reaſon of this diverſity is, for that the one is in ſubjection, and oweth Obedience, and not the other.

The wife poyſoneth an Apple, to the intent to poyſon a ſtranger therewith, and laid it to that purpoſe in a ſecret place, and the Husband by chance eateth of it, and dyeth thereof, within a Year and a day; this is petit Treaſon in the Wife, for that ſhe intended Murther thereby; ſo if the Wife poyſoneth an Apple, or other thing, and delivereth it to *B.* (knowing of the poyſon) to give to *C.* and *B.* giveth it to the Husband (without the aſſent of the Wife) who eateth thereof in the Wives abſence, and he dyeth thereof, this is petit Treaſon in the Wife: But if the Wife poyſoneth a thing, to the intent to poyſon her Husband therewith, the Husband eateth of it, and becometh very ſick, but recovereth: after a ſtranger eateth thereof, and dyeth thereof, this is onely murther in the Wife. Cromp. 20. Plowd. Com. f. 474.

If the Wife and Servant conſpire the Husbands death, he is killed by the Servant, in the abſence of the Wife, this is petit Treaſon in them both, and the Wife ſhall be burnt. But if it had been a ſtranger, it had been murder in him onely, and petit Treaſon in the Wife. Co: 3: Juſt f: 20.

Baron, and *Feme* out of affection were reſolved to go out of the World together; The Wife buyes poyſon, both take it, the Husband

dyed; It is a quære in the Book, whether this were murther in the Wife.

The Woman's Lawyer, lib. 3. sect. 44.

A Woman compasseth with her Avowterer, the death of her Husband, they assailed him, Riding on the Highway, beating, wounding, leaving him for dead, and then they fled: The Husband got up, levied Hue and cry; came before the Justices; they sent after the Offenders, which were gotten, arraigned, and the matter found by the Verdict, the Adulterer was hanged, the Woman burned to death, the Husband living: This Judgement was given when *voluntas reputabatur pro facto, Sic Metellus Celer Sergium damnavit, & non factum, sed animus in quæstionem deductus est: Plusque voluisse peccare nocuit, quam non peccasse profuit:* But at this day in case of Felony, *Non debet obesse Conatus, ubi injuria nullum habet effectum.*

3. *When a Secular, or Religious man slayeth his Prelate, Ordinary, or Superiour, to whom he oweth Faith and Obedience.*

Note, that unto the Bishop of every Diocess, the Clerks within their Dioceſs, do owe Faith and Obedience, which is called Canonical Obedience.

Note likewise, that whatsoever Act will prove murder between strangers, the same will make petit Treason from the Servant to his Master, from the Wife to the Husband, from the Clerk to his Prelate, or Ordinary, *Mutatis Mutandis*: But whether from a Child to the Father, or Mother, *&c.* may be a Quære, for some

ſome hold that it is petit Treaſon, and others that it is not.

If the Child maliciouſly killeth the Father, or Mother, this ſayes one is petit Treaſon (although the Father or Mother at the ſame time gave neither meat, drink, or Apparel, nor wages to ſuch Child) in reſpect of the duty of nature violated, *vide* 21. *E.* 3. 17 *Book* Treaſon 6.

A Baſtard killeth his Mother, this ſeemeth petit Treaſon; for the Mother is certainly known. Crompt' 21.

The Son, or Daughter in Law, killeth the Father, or Mother in Law, with whom they dwell, and do ſervice, and have meat, and drink, it is petit Treaſon; although ſuch Child take no wages, but the Indictment ſhall be by the name of Servant. Daliſons *Rep.* 1. Mar. 1.

But my L. *Coke* ſays thus; If the Child commit *Parricide* in killing his Father and Mother (of which *Solon interrogatus cur nullus parricidio ſupplicium indixiſſet? Se id neminem facturum putaſſe reſpondit.* The Law-makers never imagined any child would do) this caſe is out of the Stat. of 25. *E.* 3, *c.* 2, unleſs the child ſerved the Father, or Mother for wages, or meat, drink, or apparel, for that it is none of thoſe three kinds ſpecified in the Law aforeſaid: And yet (ſayes he) the offence is far more hainous, and impious in a child, than in a ſervant, for, *peccata contra naturam ſunt graviſſima*; but the Judges are reſtrained by the ſaid Act, to interpret it, *a ſimili*, or *a Minore ad Majus.* The hainouſneſs of this *Parricide* ap-

pears by that punishment, which is ordained in the civil Law, for those that are guilty of the Crime: *Pœna parricidij more Majorum hæc instituta est, ut parricida virgis sanguineis verberatus, deinde culleo insuatur cum Cane, gallo gallinaceo, & vipera, & simia, deinde in mare profundum Culleus jactetur*, D. 48. 9, 9. Thus much of petit Treason.

1. Murder, Co. Litt. 387, b; Stamfords Pleas of Crown, Lib. 1.

Murder cometh of the Saxon word *Mordrue*, or *Mordren*, and *Mordridus* is the Murderer even untill this day amongst them in *Saxony*, from whence we have most of our words: or, it may be derived of *Mort*, and *Dire*, as *Mors Dira*, a Cruel or Horrible death.

This Murther in our Law is Two-fold, either of himself, or of another.

1. *Of Murdering a mans self, called* Felo de se.

Felo de se (saies *Coke*) is a man, or woman, which being *Compos mentis*, of sound memory, and of the Age of Discretion, killeth himself, which being lawfully found by the Oath of Twelve men; all the Goods and Chattels of the party so offending are forfeited: And the Reason, why *Felo de se* doth forfeit all his Goods and Chattels is, because it is an offence against the King, who by that perpetration is deprived of a Subject: And indeed no man by the Law of nature hath such power over his own life, as to take it away, or to oblige it by any Contract, or Bargain, *vide Grot. Lib.* 2. *c.* 21. *nu.* 11. *Lib.* 3. *c.* 11. *nu.* 18. Having shew-

ed

ed the Deſcription of *Felo de ſe*, and the Reaſon of forfeiting his Chattels, I propoſe theſe Queries with their Reſolutions.

Whether a perſon that is non compos mentis, *giving himſelf a mortal wound, and after recovering his memory, before death enſues, be* Felo de ſe? Quære 1,

If one during the time that he is *non compos mentis* giveth himſelf a mortal wound, whereof he, when he hath recovered his memory dyeth, he is not *Felo de ſe*; And the Reaſon is becauſe the ſtroke, which was the cauſe of his death, was given, when he was not *Compos mentis*. *Et actus non facit Reum, niſi mens ſit rea*: And this is agreeable to the civil Law; *Maleficia voluntas, & propoſitum diſtinguit: voluntas & propoſitum maleficium delinquentis diſtinguit: Delictam ceſſat, ubi delinquendi animus non eſt.* Reſp, D, 47, 2, 53.

Whether a man can be ſaid to be Felo de ſe *upon an involuntary Act?* Qu, 2,

A man may be ſo; As if *A.* give *B.* ſuch a ſtroke, as he felleth him to the ground, *B.* draweth his knife, and holds it up for his own defence: *A.* in haſt, meaning to fall upon *B.* to kill him, falleth upon the knife of *B.* whereby he is wounded to death, he is *Felo de ſe*: For *B.* did nothing but that which was lawful in his own defence; *Et vim vi defendere* ſayes the civil Law, *omnes leges, omniaque jura permittunt*, D. 9. 2, 45, 4. Reſp, 44 E, 3, 44, 3 E, 5, Cor 286, Co, 3, Inſt, f. 54,

Whether the goods of Felo de ſe *be forfeited before it be found of Record, that he is* Felo de ſe? Qu, 3,

No Goods be forfeited, untill it be lawfully found by the Oath of Twelve men, that he is Reſp,

Felo

Plowd. fol,360,b. *Felo de ſe*: And this doth belong to the *Coroner*, *ſuper viſum Corporis*, to enquire thereof: and if it be found before the *Coroner*, *ſuper viſum Corporis*, that he was *Felo de ſe*, the Executors or Adminiſtrators of the dead ſhall have no Traverſe thereunto. And this is the reaſon that no man can preſcribe to have Felons goods, becauſe they are not forfeited untill it be found of Record, that he is *Felo de ſe*.

Co, Lit, f, 114, ab, l, 5, f, 109.

Qu, 4. *How a* Felo de ſe *ſhall be enquired of, where the body cannot be found?*

Reſp. If a man be *Felo de ſe*, and is caſt into the Sea, or otherwiſe ſo ſecretly hidden, as the *Coroner* cannot have the view of the body, and by conſequence cannot enquire thereof: In this caſe it may be inquired thereof by the Juſtices of Peace of that County, for they have power by their Commiſſion to inquire of all Felonies. But if it be found before them, the Executors, or Adminiſtrators of the dead may have a Traverſe thereunto, but not to the Indictment taken before the Coroner, *ſuper viſum corporis*, as before is ſaid.

Hill, 37 Eliz; *in the* Kings-Bench *by the whole Court, in the Caſe of one* Laughton *of* Cheſhire.

Qu, 5, *Whether a joynt Tenant of Chattels perſonals, becoming* Felo de ſe, *doth forfeit the whole?*

Reſp, There is a diverſity between Chattels perſonals in Action, and in poſſeſſion: for if a debt be owing to two, unleſs it be in caſe of Joynt-Merchants, and the one is *Felo de ſe*, he doth forfeit the whole: but otherwiſe it is of goods in poſſeſſion, for there he forfeiteth but his part.

8 E, 4, 4, 7 E, 4, 7, 2, Plowd, Com, 259, b,

Qu, 6, *Whether a debt upon a bare Contract be forfeitable?*

If

If a man that is *Felo deſe* has a debt upon a bare contract, and not upon ſpecialty, this ſhall not be forfeited unto the King. Thus much of *Felo deſe*. Reſp, Dyer 262, a,

2 *Of Murder in reſpect of another.*

Bracton defineth this kind of Murder to be *Homicidium, quod nullo præſente, nullo ſciente nullo audiente, nullo videnté, clam perpetratur*: And of the ſame mind is *Britton*, whoſe words are *Murdre eſt occiſion de home diſconu felonioufment fait dount home ne poit ſcaver per qui, ne per quex*: As alſo *Fleta*: *Eſt murdrum occulta hominum occiſio, a manibus hominum nequiter perpetrata, que nullo ſciente vel videnté, facta eſt, preter ſolum Interfectorem, & ſuos coadjutores & fautores*: yet *Fleta* ſaith alſo, that it was not murder, except it were proved, that the party ſlain were Engliſh, and no ſtranger: But as *Stamford* ſaith, the Law in this point hath received an alteration by the Stat. of 14. E. 3. And therefore this murder is now otherwiſe to be defined, or deſcribed: It is when a Reaſonable Creature (be it man, woman, child, Subject born, or Alien, perſons outlawed, or otherwiſe attainted of Treaſon, Felony, or premunire, Chriſtian, Jew, Heathen, Turk, or other Infidel, being under the Kings peace) is ſlain, or killed by a man of ſound memory, and of the age of diſcretion, with malice forethought either expreſſed by the party, or implied by Law. Lib, 3, c, 15, nu, 1, de Corona Britton, c, 6, Lib, 1, c, 30, 14E, 3, c, 4

Touch-

Touching the former, *viz.* Malice expreſſed, take theſe Queries with their *Solutions*:

Qu. 1.

Whether this ſame malice, though it be intended againſt one, it ſhall be extended towards another?

This Malice is ſo odious in Law, as though it be intended againſt one, it ſhall be extended towards another; And therefore *Bracton*'s words are; *ſiquis unum percuſſerit cum alium percutere vellet, in felonia tenetur*: As if *A.* put poyſon into a pot, to the intent to poyſon *B.* and ſet the ſame in a place, where he ſuppoſeth *B.* will come and drink thereof, and by accident one *C.* unto whom *A.* hath no malice, cometh, and of his own will taketh the pot, and drinketh thereof, of which poyſon he dyeth; This is murder in *A.* for the Law doth couple the event with the intention, and the end with the cauſe: But herein is a diverſity between the principal, and the Acceſſory; For if *A.* command *B.* to kill *I. S.* and *B.* killeth *I. D.* miſtaking him for *I. S.* this is murder in *B.* becauſe he did the Act, which ſprang out of the Root of malice, but *A.* is not Acceſſory, becauſe his own commandment was not purſued: But on the other ſide, if *A.* command *B.* to kill *I. S.* by poyſon, and he doth it by violence, as by weapon, ſharpe or blunt, Gun, Croſs-bow, Cruſhing, *&c.* in this caſe notwithſtanding the fact be not executed according to the mean preſcribed; yet *A.* is Acceſſory nevertheleſs; for the commandment was to kill, which enſued, though the mean was not followed.

Bol,

Co, Lib, 9, *Gorts* Caſe 81,

Plowd, Com, *Saunders* Caſe,

Whe-

Whether killing a man by poyſon be more de- Qu. 21.
teſtable, than by any other means?

To kill a man by poyſon, ſayes *Coke*, is the Sol,
moſt deteſtable of all, becauſe it is moſt hor-
rible and fearful to the nature of man, and of
all others can be leaſt prevented, either by
Manhood, or providence: This offence was
ſo odious, that by Act of Parliament it was 22 H, 8, c, 9,
made High Treaſon, and it inflicted a more
grievous and lingring death, than the common
Law preſcribed, *viz.* That the Offendor ſhall
be boyled to death in hot water: upon which
Statute *Margaret Davy* a young woman was
attainted of High Treaſon for poyſoning her Anno 33
Miſtreſs, and ſome others, was boyled to death H, 8,
in *Smithfield* the Seventeenth of *March* in the
ſame year: But this Act was afterwards re-
pealed by 1. *E.* 6. *c.* 12. and 1. *Mar. c.* 1. Ha-
ving given you the words of Sir *Edward Coke*,
touching poyſoning, I ſhall mention ſomething
in the civil Law concerning it:

Plus eſt hominem extinguere veneno, quam oc- Cod, 9, 1, 8
cidere gladio. For *Clam interficere*, ſayes *Gotha-*
fredus on the Text, *gravius eſt, quam palam.*

Plus eſt hominem veneno extinguere, quam gla- Doctores
dio occidere. ad Juſt, 4,
18 5,

Lege Cornelia, & veneficij Capite damnantur Juſt, 4, 18,
qui artibus odioſis, tam venenis, quam ſuſurris 5, D, 48,
magicis homines occiderint; vel mala medicamen- 81, & 3,
ta publice vendiderint.

Whether an Infant within the age of Nine Qu, 3,
years, can be guilty of Murder?

Un Infant deins age ix ans occiſt un Enfant de Sul,
ix ans & Confeſſe le Felony, & auxi fuit trove

que

que quant il luy avoit tue, il luy occult & enxi le Sanke que fuit ſur luy effundes, ſi il ceo excuſe; And the Judges held, that he ought to be hanged. But *Fairefax* ſaid, that the words of *Forteſcue* were, *viz.* That the Reaſon why a perſon is executed for Murder, is for example, that others may fear to offend; But ſuch puniſhment can be no example to ſuch an Infant, or to a perſon that hath not diſcretion.

3H, 7, 1, b.

Le Recorder de Londres monſtre coment un enfant entra le age de x. ans, & xii. ans fuit endite de mort, & il fuit appoſe de ceo, & il dit, que il gard barbettes ove ceſtuy que eſt mort & ils happen a variance per que il luy feriſt en le gule, puis en le Teſte & iſſint en divers Lieux del corps tanque qu'il fuit mort, & donques il trahiſt le corps en le corne, & les Juſtices pur ſon rendr', & pur ceo que il narroit le matter playnem ent reſpite le Judgment, & pluſours Juſtic' diſont, que il fuit deigne mort &c. And the Reaſon is, *quia malitia ſupplet etatem*: with this our Rule do concur the Roman Laws.

3H, 7, 12, b

Impunitas delicti propter etatem non datur, ſi modo in ea quis ſit, in quam crimen, quod intenditur, cadere poteſt; *i. e. ſi modo ſit proximus pubertati, & ea ſentiat in quibus deliquit.*

Cod 9, 47, 7, de Pœnis, Gothofredus,

Malitia minoris etatem juſtam eſſe repreſentat, ac ſupplet, vel ſic: Malitiæ non ſuccurritur.

Qu, 4,

Whether Malice prepenſed muſt be continuing, till the mortal wound given?

Sol,

Albeit there had been malice between two, and after they are pacified, and made friends, and after this upon a new occaſion fall out, and the one killeth the other, this is *Homicide*, but

Co, 3, Inſt, f, 51,

no

no murder, becauſe the former malice continued not.

So if *A.* command *B.* to kill *C.* and before the Act be done, *A.* repenteth, and countermandeth his Commandment, and charge *B.* not to do it; if *B.* after killeth him, *A.* is not acceſſory to it; for the malicious mind of the Acceſſory ought to continue to do ill, untill the Act done. Ibid,

Whether Murder can be committed of a child in utero matris? Qu, 5,

If a Woman be quick with Child, and by a Potion, or otherwiſe killeth it in her womb; or if a man beat her, whereby the Child dyeth in her Body, and ſhe is delivered of a dead Child, this is a great miſpriſion, and no murder: But if the Child be born alive, and dyeth of the Potion, Battery, or other cauſe, this is murder; for in Law it is accounted a reaſonable Creature, *in rerum natura*, when it is born alive. Sol, 22E.3Cor 263. 8E.2,Cor. 418,

The Law holden in *Bracton*'s time was, *ſi aliquis, qui mulierem pregnantem percuſſerit, vel ei venenum dederit, per quod fecerit abortivus ſi puerperium jam formatum fuerit; & maxime ſi fuerit animatum, facit homicidium.* And let us now ſee what the civil Law ſaith, *de partu abacto; ſi mulierem viſceribus ſuis vim intuliſſe, quo partum abigeret, conſtiterit, eam in exilium preſes Provinciæ exiget.* D, 48,8,8,

Cicero in oratione pro Cluentio Avito ſcripſit, Mileſiam quandam mulierem, cum eſſet in Aſia, quod ab heredibus ſecundis accepta pecunia partum ſibi medicamentis ipſa abegiſſet, rei Capitalis eſſe damnatam. D, 48, 19, 39, *de partu abacto,*

Whe-

Qu, 6, *Whether it be murder in a Mother to conceal the death of her Baſtard Child?*

Sol, It is Enacted, That if any Woman be delivered of any Iſſue, Male, or Female, which be-
21 Jac, c, 27, ing born alive, ſhould by the Lawes be a Baſtard, and ſhe endeavour privately, either by drowning, or ſecret burying thereof, as that it may not come to light, whether it were born alive, or not, but be concealed; In every ſuch caſe the ſaid Mother ſo offending, ſhall ſuffer death as in caſe of murder, except ſuch Mother can make proof by one witneſs at leaſt, that the Child, whoſe death was by her ſo intended to be concealed, was born dead.

Qu, 7, *Whether he that ſtabbeth another to death ſhall ſuffer, as in caſe of wilful murder?*

Sol, It is Enacted, That every perſon, which ſhall ſtab, or thruſt any perſon, that hath not
1 Jac, c, 8, then any Weapon drawn, or hath not then firſt ſtricken the party, which ſhall be ſo ſtabbed, or thruſt; ſo as the perſon ſtabbed, or thruſt, ſhall thereof dye, within the ſpace of ſix months, although it cannot be proved, that the ſame was done of malice forethought; yet the party ſo offending, and being thereof convicted by the Verdict of Twelve men, Confeſſion or otherwiſe, according to the Laws of this Realm, ſhall be excluded from the benefit of his Clergie, and ſuffer death, as in caſe of wilful murder.

Qu, 8, *Whether a Murder committed out of the Realm, can be tryed by the Common Law?*

Sol, If two of the Kings Subjects go over into a
13 H, 4, 6, Forreign Countrey, and fight there, and the

one

one kill the other, this Murder being done out of the Realm, cannot be for want of Tryal heard, and determined by the common Law of *England*; but it may be heard and determined before the *Conſtable* and *Marſhal*, whoſe Sentence is upon the teſtimony of witneſſes, and combat; and accordingly where a Subject of the *King* was ſlain in *Scotland* by others of the Kings Subjects, the Wife of the party ſlain had her appeal therefore before the Conſtable and Marſhal; and ſo it was reſolved in the 35*th*, year of Queen *Elizabeth*, in the caſe of Sir *Francis Drake*, who ſtrook off the head of *Dowtie*, in *partibus tranſmarinis*, that his Brother and Heir might have an appeal. Stamf: *pl. cor. f.* 65. Co.Lit.70. *a, b*

So if a man be mortally wounded in *France*, and dyeth thereof in *England*, it is ſaid that an Appeal doth lye upon the ſtatutes of 12 *R.* 2. *c.* 2. and 1 *H.* 4. *c.* 14. for it is not puniſhable by the common Law, becauſe the ſtroak was given there where no *Viſne* can come, and therefore the ſame ſhall be heard and determined before the Conſtable and Marſhal: Thus much of Murder proceeding from Malice prepenſed and expreſſed; as for Malice implyed, it hapneth in three caſes. Co.Lit.70. *b.* Co. 3 Inſt. 48.

1 In reſpect of the manner of the deed; as if one killeth another without any provocation of the part of him that is ſlain, the Law implyeth malice: if one make a wry, or diſtorted mouth, or the like countenance upon another, and the other immediatly purſues, and kills him, it is murder, for it ſhall be preſumed to bemalice precedent; and that ſuch Co: *lib.* 9. Mac. *Rellyes.*

Cro. 1. part Wars v. Braine f. 779.

a ſlight provocation is not a ſufficient ground or pretence for a Quarrel.

Cro. 3 part Hallow. caſe 131.

One *Halloway* was Indicted and Arraigned at *Newgate* for Murthering one *Payne*, the Indictment was, that he *Ex malitia præcogitata* tyed the ſaid *Payne* at the Horſes tayle, and ſtrook him two ſtroaks with a cudgel, being tyed to the ſaid Horſe, whereupon the Horſe ran away with him, and drew him upon the ground three Furlongs, and thereby brake his ſhoulder, whereof he inſtantly dyed, and murdered him: Upon this Indictment he being arraigned, pleaded nor guilty, and thereupon a ſpecial Verdict found, that the Earl of *Denbigh* was poſſeſſed of a Park called *Auſterly Park*, and that the ſaid *Halloway* was Wood-ward of his Woods in the ſaid Park, and that the ſaid *Payne* with others unknown, entred the ſaid Park to cut Wood there, and that the ſaid *Payne* climbed up a Tree, and with an hatcket cut down ſome boughs thereof, and that the ſaid *Halloway* came riding into the Park, and ſeeing the ſaid *Payne* on the Tree, commanded him to deſcend, and he deſcending from thence, the ſaid *Halloway* ſtroke him two blows upon the back with his cudgel, and the ſaid *Payne* having a Rope tyed about his middle, and one end of the Rope hanging down, the ſaid *Halloway* tyed the end of that Rope to the Horſes tayle, and ſtruck the ſaid *Payne* two blows upon his back, whereupon the ſaid *Payne* being tyed to the Horſes tayle, and the Horſe rnnning away with him, drew him upon the ground three Furlongs, and by this

this meanes brake his ſhoulder, whereof he inſtantly dyed, and the ſaid *Halloway* caſt him over the pale into certain buſhes, and whether upon all this matter found, the ſaid *Halloway* be guilty of the Murder *prout*, they pray the diſcretion of the Court, and if the court ſhall adjudg him guilty of Murder, they find him guilty of Murder; if otherwiſe, they find him guilty of Man-ſlaughter; and this ſpecial Verdict by *Certiorari* was removed into the Kings Bench, and depended three Termes; and the opinion of all the Judges and Barons was demanded, and they all (beſides *Hutton*, who doubted thereof) held clearly that it was Murder: for when the Boy who was cutting on the Tree came down from thence upon his command, and made no reſiſtance, and he then ſtruck him two blowes, and tyed him to the Horſes tayle, and ſtruck him again, whereupon the Horſe ran away, and he by that meanes ſlain, the Law implies malice, and it ſhall be ſaid in Law to be malice prepenſed, he doing it to one who made no reſiſtance; he was adjudged to be hanged, and was hanged accordingly.

If a man give poyſon to another perſon, of which poyſon the party dyeth within the Year, this implyeth malice, and is adjudged wilful Murder of Malice prepenſed. Co. 3. Inſt. 52.

Note, that a man may be poyſoned Four manner of wayes.

1 *Guſtu*, by Taſte, that is by Eating or Drinking, being infuſed into his meat or drink.

2. *Anhelitu*, by taking in breath, as by a poysonous perfume in a Chamber, or other Room.

3 *Contactu*, by touching.

4. and lastly, *Suppositu*, as by a Glister, or the like. Thus much of malice implyed in respect of the manner of the Deed.

2 Malice implyed doth happen in respect of the person slain.

And therefore it hath been resolved, that if any Sheriff, Under-Sheriff, Sergeant, or Officer who hath execution of Process be slain in doing his Duty, it is murder in him who kills him, although there were not any former malice betwixt them; for the Executing of Process is the life of the Law; and therefore he who kills such an Officer shall loose his life; for that Offence is *Contra potestatem Regis & Legis*, and therefore in such case there needs not any inquiry of malice.

Co: *lib*: 9. Mackalleys *case*, Cro: 2 *part*, Mackalleys *case*, Co. *lib*:4. Youngs *case*.

The same Law is, if any Justice of Peace, Constable, or any other Officer, or any who comes with them in their Assistance, for the preservation of the peace be slain in executing their Office, it is murder through malice implyed: so if a Watch-man be killed in staying Night-walkers, it is murder.

One *Thomas Pew* was Arraigned for the murder of one *Gardiner*, and upon evidence it appears that the said *Gardiner* was a Bayliff Sworn and known, and Under-Bayliff to the Dean of *Westminster*; and he having the Sheriffs Warrant to Arrest the said *Thomas Pew*,

Co. Inst. *f*. 52.

Pew, upon a *Capias* out of the common Bench, and ſeeing him in Shyre-lane within the liberty of *Weſtminſter*, the ſaid *Pew* ſeeing him, drew his Sword, and the ſaid *Gardiner* approaching to lay hold upon him; (not uſing any words of Arreſt (as was proved,) *Thomas Pew* ſaid (as it was proved upon the Examination of two Witneſſes before the Coroner) ſtand off, come not near me, I know you well enough, come at your peril; and the Bayliff taking hold of him, he thruſt him with his Sword that he dyed immediatly: It was held by all the Court that it was murder, for he coming as an Officer to Arreſt, and not offering any violence, or provocation, although he uſed not words, I Arreſt you, or ſhewed him any Warrant, becauſe peradventure he had not time, nor was demanded the cauſe, the Law preſumes it to be malice and murder in him that ſo kills one being an Officer, and coming to execute proceſs.

Reſolved that if there be Error in Awarding of proceſs, or in the miſtake of one proceſs for another, and an Officer be ſlain in the Execution thereof, the offendor ſhall not have the Advantage of ſuch Error no more then a Sheriff who ſuffers a priſoner to eſcape, ſhall take advantage of any Error thereby; but the Reſiſting of an Officer when he comes to make an Arreſt in the Kings name, is murder: But a man ſhall take advantage againſt an Officer where he is ſlain in doing an unlawful act; ſo likewiſe upon a variance in an eſſential part of the parties Name.

Cro: 2 *part* Mackalleyes *caſe*,

As to the former, take this Resolution:

One *Cook* was Indicted for the Murder of *Marshal*, upon his Arraignment pleading not guilty, it was found that the said *Marshal* was a Bayliff to the Sheriff of ——— and had several Warrants upon several *Capias ad satisfac.* against the said *Cook*, and his Father directed unto him, and other Bayliffs, and that they by vertue or colour thereof, entred into the said *Cooks* stable and out-house, and hid themselves all Night, and at 8 of the clock next morning coming to *Cooks* dwelling House, called to open his doors, and suffer them to enter, because they had such Warrants upon such Writs at the Suit of such persons to Arrest him, and willed him to obey them: But the said *Cook* commanded them to depart, telling them they should not enter; and thereupon they brake the Window, and afterward came unto the door of the said House, and offered to force that open, and brake one of the Hinges thereof, whereupon the said *Cook* discharged his Musquet at the said *Marshal*, and strook him, of which stroke the day following he Dyed; and whether upon all this matter he be guilty of Murder or Manslaughter, was the doubt. After Argument for *Cook* at the Bar, all the Justices delivered their opinions, that it was not Murder, but Man-slaughter only; for although he killed a Bayliff, yet he killed him not in duly executing process; for it is not Murder, unless there be *Malitia præcogitata*, or *Malitia implicita*, as to Murder one suddenly, or in Resistance

Crook 3 part, Cooks *case* 573.

ſiſtance of an Officer doing his Office by ſerving the proceſs of Law wherein he is aſſiſted *Cum poteſtate Regis & Legis.* But here this Bayliff was ſlain in doing an unlawful Act, in ſeeking to break open the Houſe, to execute proceſs for a Subject, which he ought not to do by Law; although he might have Entred if the door had been open and arreſted the party, and it had been lawful, yet he ought not to break open the Houſe, for that it is not Warranted by Law, and eſpecially lying there in the night, and in the morning breaking the Window, and offering to force the door, which is not ſufferable, for under colour thereof one may enter who hath not any ſuch Authority, and every one is to defend his own Houſe; yet they all held that it was Man-ſlaughter, for he might have reſiſted him without killing him, and when he ſaw him, and ſhot voluntarily at him, it was Man-ſlaughter.

As to the later touching the parties name, take this Reſolution:

Sir *Henry Ferrers* was Indicted by the name of Sir *Henry Ferrers* Knight, for the Murder of one *Stone* whom one *Nightingale* Feloniouſly murdered, and that the ſaid Sir *Henry* was preſent, aiding and abetting *&c.* Upon this Indictment Sir *Henry Ferrers* being Arraigned, ſaid that he was never Knighted, which being confeſſed, the Indictment was held not to be ſufficient; wherefore he was Indicted *de novo*, by the name of Sir *Henry Ferrers* Baronet, and being Arraigned, pleaded

Co. 3 part Ferrers caſe, f. 371, 372.

Not Guilty, and was tryed at the Bar, and upon Evidence it appeared that he was Arrested for Debt, and that *Nightingale* his Servant in seeking to Rescue him as was pretended, killed the said *Stone*; but because the Warrant to Arrest him was by the name of Sir *Henry Ferrers* Knight, and he never was a Knight; it was held by all the Court, that it was a variance in an Essential part of the Name, and they had no Authority by that Warrant to Arrest Sir *Henry Ferrers* Baronet: So it is an ill Warrant, and the killing of an Officer in executing that Warrant cannot be murder, because no good Warrant.

3. There is malice implyed in respect of the person killing.

As if *A.* assault *B.* to Rob him, and in resisting *A.* killeth *B.* this is Murder by malice implyed, albeit he never saw, or knew him before.

So if a prisoner by the Dures of the Goaler cometh unto an untimely death, this is murder in the Goaler, and the Law implyeth malice in respect of the cruelty; and this is the cause, that if any man dyeth in prison, the Coroner ought to set upon his Body, to the end it may be inquired of, whether he came to his death by Dures of the Goaler, or otherwise.

Co. 3. Inst. f. 52, & 91.

So if the Sheriff or other Officer where he ought to hang the party attainted according to his Judgment, and his Charge, will against the Law, of his own wrong, burn or behead him, or *e converso*; the Law in this case implyeth malice in him.

Doct. & Stud. *lib.* 2. *c.* 41. Co. 3. Inst. f. 52. & 217.

So

So if a *Capias* be directed unto the *Sheriff*, to take a man in an Action of Debt, or Treſpaſs, there no man can take the Party but he muſt have Authority from the *Sheriff*; and if any man attempt of his own Authority to take him, and he Reſiſteth, and in Reſiſting is ſlain, he that would have taken him is guilty of Murder. Doct. & Stud: *lib.* 2. *c.* 42.

So if the *Sheriff* will by the Authority which the Law giveth him, Arreſt any man for Felony, which is not guilty, the party may Reſcue himſelf, and if upon the Reſcous the party is ſlain by the *Sheriff*, he is guilty of his death. But if *A.* be Indicted of Murder, Robbery, Burglary, or other Felony, and the *Sheriff* by vertue of a *Capias* offer to Arreſt him, and he Reſiſteth and flyeth, the *Sheriff* may kill him, if otherwiſe he cannot Arreſt him, although in truth the party be *Not Guilty*, nor any Felony done: So by this we ſee that there is a diverſity between a *Warrant* of *Record*, and a *Warrant* and Authority in Law. Co. Lit. 161, *a.* Co. 3. Inſt. 221. 4 H. 7. 20. 14 H. 8. 18

Thus much of *Homicides* Voluntary, and of Malice fore-thought, *viz.* Petit Treaſon, and Murder.

It was the Law of *Numa Pompilius*: *Si quis Hominem Liberum dolo ſciens morti duit, parricida eſt.*

As there are *Homicides* that are voluntary, and of malice fore thought, ſo there are ſome that be voluntary, and not of malice fore-thought; of which ſome be Felony, as Manſlaugh-

ſlaughter, and ſome be not Felony, as *Se Defendendo*, &c.

1. *Of* Homicide, *which for Diſtinction-ſake we call* Manſlaughter.

Co. Lit. 287. *b.*

Man-ſlaughter is when one is ſlain with a mans will, but not with malice prepenſed upon ſome ſudden falling out, or Quarrel; as if two meet together, and ſtriving for the Wall the one kill the other; this is Manſlaughter and Felony. So if two fall out upon a ſudden occaſion, and agree to fight in ſuch a field, and each of them go and fetch their Weapon, and go into the field, and therein fight, the one killeth the other; here is no malice prepenſed, for the fetching of the Weapon, and going into the field, is but a continuance of the ſudden falling out, and the Heat of the Blood kindled by Ire, was never cooled till the blow was given. But if they appoint to fight the next day, that is malice prepenſed, and conſequently not Man-ſlaughter, but Murder.

Co. Inſt, 51. & 55.

One *Royley* was Indicted of the Murder of *William Derman*, and upon his Tryal a ſpecial Verdict was found, which was removed into the Kings Bench by *Certiorari*; whereupon the caſe was found to be ſuch, that *William Royley* Son of the ſaid *Royley* fighting with the ſaid *Derman*, and the ſaid *Derman* beating him ſo as his Noſe bled, he thereupon went to his Father, telling and complaining unto him of that Battery; whereupon the Father inſtantly

Cro. 2. *part* 2. Royleys *caſe*, 296.

ſtantly went into the field, and finding *Derman*, called him Villein, and other opprobrious terms, and ſtruck him with a little cudgel, of which ſtroke he afterwards dyed; and whether that were murder, or only man-ſlaughter, they doubted, and prayed the diſcretion of the Court, and all the Court Reſolved, that it was but man-ſlaughter, for he going upon the complaint of his Son, not having any malice before, and in that anger beating him, of which ſtroke he dyed, the Law ſhall adjudg it to be upon that ſudden occaſion, and ſtirring of Blood, being alſo provoked at the ſight of his Sons blood that he made that Aſſault, and will not preſume it to be upon malice, unleſs it be found. And although the diſtance of the place where his Son complained was a mile, it is not material, being all upon one paſſion. So if one hear that his Brother, Couſin, or Servant is fighting upon a ſudden occaſion, and he go to the place where they are fighting, (although a mile or more diſtant,) and finding the Adverſary, fights with him, and kills him, it is not Murder, but Man-ſlaughter, and being before the general Pardon, was diſcharged thereby.

Thus much of Man-ſlaughter, that is not of malice prepenſed, but yet Felony.

3. Of Se Defedendo, *that is Voluntary, and not Felony.*

Se Defedendo is voluntary Homicide, and yet being done upon an inevitable occasion, is no Felony; as if *A.* be Assaulted by *B.* and they fight together, and before any mortal blow given *A.* giveth back until he cometh to a hedg, wall, or other straight beyond which he cannot pass, and then in his own Defence killeth the other, this is voluntary, and yet no Felony; and the Jury that find it was done *Se defedendo*, ought to find the special matter.

But yet there are some Cases wherein a man is bound to give back; as

Fleta *lib.* 1. *c.* 23. Co. 3. Inst. 56.

1. If *A.* Assault *B.* so fiercely and violently, and in such a place, and in such a manner as if *B.* should give back, he should be in danger of his life, he may in this Case defend himself, and if in that Defence he killeth *A.* it is *Se Defedendo*, because it is not done *Felleo animo*, and consequently Justifiable; with our Law dos Concur the Law Imperial: *Jure hoc evenit, ut quod quisque ob tutelam Corporis sui fecerit, jure fecisse existimetur. Non injuria*

D: 1. 7, 3.

D. 47. 9, 3. 7.

fecit, qui se tueri voluit, cum alias non posset.

Co. *lib.* 5. Semaynes *case* 21. 1 H. 7. 39 Co. 3. Inst. 56.

2. If a Thief offer to Rob or Murder *B.* either abroad, or in his House, and thereupon Assault him, and *B.* defend himself without any giving back, and in his Defence killeth the Thief, this is no Felony, for a man shall never

never give way to a Thief, *&c.* neither ſhall he Forfeit any thing, and ſo it is declared by the ſtatute of 24 *H.* 8. *c.* 5.

One *Cooper* being Indicted in the County of *Surrey* of the murder of one *W. L.* in *Southwark*, he pleaded *Not Guilty*, and upon his Arraignment it appeared that the ſaid *Cooper* being a priſoner in the Kings Bench, and lying in the Houſe of one *Anne Carrick*, who kept a Tavern within the Rules, the ſaid *W. L.* at one of the clock in the Night aſſaulted the ſaid Houſe, and offered to break the ſtaple thereof, and ſwore he would enter the Houſe, and ſlit the Noſe of the ſaid *Anne Carrick*, becauſe ſhe was a Bawd, and kept a Bawdy-Houſe; and the ſaid *Cooper* diſſwading him from theſe Courſes, and reprehending him, he ſwore that if he could enter, he would cut the ſaid *Coopers* Throat; and he brake a window in the lower Room of the Houſe, and thruſt his Rapier in at the window againſt the ſaid *Cooper*, who in defence of the Houſe, and himſelf, thruſt the ſaid *W. L.* into the eye, of which ſtroak he dyed. The Queſtion was, whether this were within the Statute of 24 *H.* 8. and the opinion of the Court was, that if it were true that he brake the Houſe with an intent to commit Burglary, or to kill any therein, and a party within the Houſe, (although he be not the Maſter, but a Lodger or Sojourner therein) kill him who made the Aſſault, and intended miſchief to any in it, that it is not Felony, but excuſable by the Statute of 24 *H.* 8. Cro. 3. *part* Cowpers *caſe*, 554.

H. 8. which was made in the affirmance of the Common Law; wherefore the Jury were appointed to conſider of the circumſtances of the Fact, and they being a ſubſtantial Jury of *Surrey*, found the ſaid *Cooper* not Guilty upon the Indictment, whereupon he was diſcharged.

22 Aſs. pl. 55. 3. If a priſoner aſſault the Goaler, the Goaler is not by Law inforced to give back, but if in defence of himſelf he kill the priſoner, this is no Felony.

3 E. 3. Cor. 290. 4. If any Officer or Miniſter of Juſtice that hath lawful Warrant, and the party aſſault the Officer, or Miniſter of Juſtice, he is not bound by Law to give back, but to carry him away; and if in execution of his Office he cannot otherwiſe avoid it, but in ſtriving kill him, it is no Felony.

Note, if men tilt or turney in the preſence of the King; or if two Maſters of Defence playing their prizes kill one another, this is no Felony, 11 *H.* 7. 23. *a. Hobarts Reports, Weaver v. Ward f.* 134. And the reaſon given is, for that in Friendly manner they contend to try their ſtrength, and to be able to do the King ſervice in that kind as occaſion ſhould be offered.

Hitherto of *Homicides* that be voluntary, and no Felony, whereof ſome be in reſpect of giving back inevitably in defence of himſelf, upon an aſſault of Revenge, and ſome without any giving back, *&c.* I now proceed to that Homicide that is not Felony, neither fore-thought, nor voluntary, and this we call

call Man-ſlaughter by miſadventure, or Chance-medley.

3. *Of Homicide by miſadventure.*

Chance medley, or *per Infortunium*, is when one is ſlain caſually, and by miſadventure, without the will of him that doth the Act, whereupon death enſueth. Or Homicide by miſadventure is when a man without any evil intent doth a lawful thing, or that is not prohibited by Law, and another is ſlain or cometh to his death thereby, as if one ſhoot at Butts, or at pricks, and kill a man, by ſwarving his hands, this is no felony; The ſame Law is of tiling an Houſe, and a tile fall, and killeth one. So if one trained Souldier hurteth another in skirmiſh, of which hurt he dies, this being by miſadventure is no felony. But in any of theſe Caſes before put if a man be hurt or maimed only, an Action of Treſpaſs lieth againſt him that was the cauſe of the hurt, or maime, though it be done againſt the parties mind and will; becauſe in Civil Treſpaſſes and injuries, that are of an inferior nature, the Law doth rather conſider the damage of the party wronged, then the mind of him, that was the wrong doer.

Co. Litt: 287. 6.

11. H. 7. 23. a. 21. H. 7: 28. a. 6. E. 4. 7.

Bract. l. 3. *c.* 4. *n.*3.

Vide Hobarts Reports Weaver againſt Ward f. 134. But to return from whence I have made a digreſſion: It is to be conſidered, whether he that commiteth this Homicide by miſadventure in doing a lawful

Act,

Act, and likewiſe without an evil intent; for if the Act be unlawful, or done with an evil purpoſe, it will prove murther.

1. Touching an unlawful Act: If a man ſhoot at a Cock or Hen, or any fowl of another man, and the arrow by miſchance kill a man, this is ſaid to be murther, for the Act was unlawful. So if a man doth beat another, and with intent not to kill him, yet if the party be killed by this battery, it is felony.

So if two are fighting together, and a third cometh to part them, and is killed by one of them two, without any malice forethought, yet this is murther in him, and not Homicide by Chancemedley, or miſadventure, becauſe that they two that fought together, were in doing of an unlawful Act. And if they were met with prepenſed malice, the one intending to kill the other, then it is murther in them both.

11. H. 7. 23. a.

2. Touching an evil Intent: If a man knowing that many people come in the ſtreet from a Sermon, throw a ſtone over a wall, intending only to fear them, or to give them a light hurt, and thereupon one is killed, this is murther, for he had an evil intent, though that intent extended not to death, and though he knew not the party ſlain.

Note, though the killing of a man by miſadventure, or by chance, be not felony, *Quia in maleficiis voluntas ſpectatur, non exitus.* D. 48. 8. 14. yet the party guilty ſhall forfeit

Co. 3. Inſt. f. 57.

forfeit therefore all his Goods, and Chattels, to the intent that men ſhould be cautious, as they tend not to the effuſion of mans blood. I ſhall conclude this learning touching Homicides, with ſomewhat appertaining to Phyſicians and Chirurgians.

If one that is of the myſtery of a Phyſician, take a man in Cure, and giveth him ſuch Phyſick, as within 3 dayes he dies thereof without any felonious intent, and againſt his will, it is no Homicide: But *Briton* (cap. 5. *De Homicidet*,) ſaith, that if one who is not of the myſtery of a Phyſician or Chirurgion, take upon him the Cure of a man, and he dieth of the potion, or Medicine, this is, ſaith he, Covert felony. In the Civill Law it is thus: *Medico imputari eventus mortalitatis non debet: Ita quod per imperitiam commiſit, imputari ei debet, prætextu humanæ fragilitatis delictum decipientis in periculo homines inoxium eſſe non debet.* Co. 3. Juſt. 57. D. S 182 6. 7.

Imperitia culpæ adnumerontur: veluti ſi Medicus ideo ſervum tuum occiderit, quia male ſecuerit: aut perperam ei medicamentum dederit, Juſt. 4. 3. 7.

Thus much of the Pleas of the Crown, that have relation to the life of man; I proceed now to thoſe that reſpect the body and members.

2. *Of those Crimes, that appertain to mans body, or members, and they are* Battery, Mayhem, *and* Rape.

1. Of Battery. *Battery*, is when a man assaulteth and beateth another, this is against the Law and Peace of the Realm, which ordaineth, that no man shall be his own Judge, or revenger of his own private wrong, but shall leave this to the Censure of the Law; (And this is agreable to the Roman Laws: *Generali lege decernimus, neminem sibi esse judicem vel jus sibi dicere debere. In re enim propria iniquum admodum est alicui licentiam tribuere sententiæ.* Again: *Non est singulis concedendum, quod per Magistratum publice possit fieri, ne occasio sit Majoris tumultus faciendi*: wherefore he that is so beaten may indict the other party, who upon it shall be fined to the King: But some there are that may in a reasonable and moderate manner chastise, correct and beat others.

Cod. 3. 5. 1.

D. 50. 17. 176.

1. In respect of power, proceeding from the Law of nature, as Parents may correct their own Children.

2. In respect of Authority œconomical, as the Master may chastise his Servant, or Apprentice.

3. In respect of power arising from Civil Justice; as the Gaoler and his servant, the unruly prisoners; the Officers, him that is arrested,

arreſted, and will not otherwiſe obey.

Alſo a man may juſtify the beating of another, in defence of his own perſon, or of the perſon of his Wife, Father, Mother, or Maſter: But when any is aſſaulted, or beaten in Church, or Churchyard, it is not lawful for him to return or give any blows in his own defence, as he may elſewhere in other places. Cro. 1. part Frances. v. Leg.

Mahim, or maime (*Mahemium*) cometh of the old French (Mehaigne) a Maime a corporal hurt, whereby a man loſeth the uſe of any member. The Canoniſts call it *Membri mutilationem*, or *Maybem*, is where by the wrougful Act of another any member is hurt or taken away, whereby the party ſo hurt is made unperfect to fight: As if a bone be taken out of the head: or a bone be broken in any other part of the body, or foot, or hand, or finger, or joynt of a foot, or any member be cut: or by ſome wounds the ſinews be made to ſhrink or other member, or the fingers made crooked, or if any eye be put out, or the fore-teeth broken, or any other hurt in a mans body, by means whereof he is made the leſs able to defend himſelf, or offend his enemy: But the cutting of an ear or * noſe, or breaking the hinder teeth, or ſuch like, is no *Maybem*, becauſe it is rather a deformity of the body, then diminiſhing of ſtrength, and that is commonly tryed by beholding the party by the Juſtices. And if the Juſtices ſtand in doubt, whether the hurt be a *Maybem* or not, they uſe, and 2. Of Mahim. Co. Lit. 126. a. F. 288. a.

* *Note, that to cut maliciouſly the noſe of another, is made felony, by a Law enacted in the Reign of his now Majeſty.*

will of their own discretion, take the help and opinion of some skilful Chirurgeon, to consider thereof, before they determine upon the Cause.

Co. Lit. 127. a, b. But whether a man may be indicted for maiming himself? To this it answered, that he may; As it appears in the Case of one *Wright*, *anno* 11. *Jac.* in the County of Leicester; who being a yong, strong, and lusty rogue, to make himself impotent, thereby to have the more colour to beg, or to be relieved, without putting himself to any labor, caused his Companion to strike off his left hand, and both of them were indicted, fined, and ransomed therefore, and that by the opinion of the rest of the Justices, for the members of every subject are under the safeguard and protection of the King, to the end that they may serve the King, when occasion shall be offred, and therefore not in the power of a subject to maim or hurt his own body or limbs, or to cause another to do it. And this is agreable to the Civil Law, *Nemo membrorum suorum est dominus: Liber homo suo nomine utilem aquiliæ habet actionem: directam enim non habet; quoniam dominio membrorum suorum nemo videtur.*

D. 9. 2. 13.

By the ancient Law of England, he that maimed any man, whereby he lost any part of his body, the Defendant should loose the like part, (as he that took away another mans life, should loose his own) And this was grounded upon the Law of God, *Levit.* 24. *v.* 18, 19. 20. *Deut.* 19. *v.* 21. It

Co. 3. Instit. 118.

is called among the Latines *Lex Talionis*, or *Reparationis*, among the *Greeks*, Ἀντεπιτυθὸς, *per quam quis patitur, quod alteri fecit.*

This offence of *May'em* is under all felonies deserving death, and above all other inferiour offences, so as it may be truly said of it, that it is, *Inter crimina majora minimum & inter minora maximum.* Co. Litt. 127. a.

Rape, is the violent deflouring of a Woman against her will; and this offence is felony, as well in the principal, as in his Aiders. *vide* 11. *Hen.* 4. *c.* 13. 1. *E.* 4. *c.* 1. *West.* 2. *c.* 13. *Cromptons* Justice of Peace *f.* 43, 44. But my Lord *Coke* defines it thus: It is when a man hath carnal knowledge of a woman by force, and against her will, or Rape is felony by the Common-Law, declared by Parliament for the unlawful and carnal knowledg, and abuse of any woman above the age of ten years against her will, or of a woman child under the age of ten years, with her will, and the offender shall not have the benefit of Clergy. *Vide* 18. *Eliz. c.* 6. 3 Of Rape. Co. Litt. 123. *b.* Co. 3. Instit. *f.* 60.

If the party that is ravished, conceive by the Ravisher a child at the time of the Ravishment, this is no Rape, because she could not conceive, unless she assent. Stamf. 24.

Bracton in 24*th* chapter of his third book sheweth, that by the Antique Law of King *Athelstan*, He that meeting a Virgin *sole*, or with company, did but touch her unhonestly, was guilty of breaking the Kings Edict; If against her will, he threw her on

the ground, he loſt the Kings favour; if he diſcovered her, and caſt himſelf upon her, he loſt all his poſſeſſions: if he lay with her, he ſuffereth Judgement of life, and member: yea, if he were an Horſe-man, his horſe loſt his tail and main. His hawk likewiſe loſt her beak, Tallons and train. And the Virgin had in recompenſe all his Land and money by the Kings Warrant. This was in the King *Atheſtans* dayes; But in *Bractons* time, it ſeemeth that theſe kind of Raviſhers were otherwiſe puniſhed, they loſt their eyes and privy members. *Co. Litt.* 123. *b.* 29. *H.* 6. *Tit. Coron.* 17. *Bracton lib.* 3. *f.* 147.

D. 48. 6. The Civil Law: *Punitur Lege Julia de vi publica, qui puerum, vel fœminam, vel quemquam per vim ſtupraverit.*

Hitherto of the offences, that touch the body and members; *viz.* Battery, Mayhem, and Rape.

3. *Of thoſe Offences that diſpoil men of their property.*

Thoſe Crimes or Pleas of the Crown, that deprive others of their property, are two, §. *Furtum*, or Theft, and Burning of Houſes.

1. *Of Theft.*

In Theft are to be conſidered 3. things, the Etymology of the word *Furtum*, the definition, and its ſeveral kinds.

Furtum,

Furtum, a furvo, id eſt, nigro dictum Labeo ait: quod clam & obſcuro fiat, & plerumque nocte; vel a fraude, ut Sabinus *ait: vel a ferendo & auferendo: vel a Græco ſermone, qui Φῶρας appellant fures: Imo & Græci ἀπὸ τȣ̃ Φέρειν, id eſt, a ferendo Φῶρας dixerunt.* 1. The Etymology. D. 47. 2. 1. Juſt. 4. 1, 2.

Bracton thus defines it, *Furtum eſt ſecundum Leges, contrectatio rei alienæ fraudulenta, cum animo furandi, invitò illo Domino, cujus res illa fuerit. Lib. 3. f. 150.* 1. The definition.

The Civilians thus: *Furtum eſt contrectatio fraudulosa, lucri faciendi gratia, vel ipſius rei, vel etiam uſus ejus, poſſeſſionisve, quod lege naturali prohibitum eſt admittere.* Juſt. 4. 1. 1. D. 4. 7. 2. 1. 3.

That Theft is forbidden by the Law of nature, is manifeſt by theſe Authors.

1. Cicero: *In vita ſibi quemque petere quod pertineat ad uſum non iniquum eſt: alteri ſuripere, jus non eſt.*

Theft generally taken, doth comprehend *Larceny*, *Robbery*, *Burglary*, and *Pyracy*: of theſe in order. 3 Its ſpecies or kinds.

1. *Of Larceny.*

Larceny, by the Common Law, is the felonious and fraudulent taking, and carrying away by any man or woman, of the meer perſonal goods of another, neither from the perſon, nor by night in the houſe of the owner: This Larceny is twofold, the one ſo called Simply, and the other Petit, or Little Larceny. Co. 3. Inſt. 107.

The firſt is where the thing ſtollen ex-

ceeds the value of 12. pence, and that is felony.

The other (which is called little, or petit Larceny) is where the thing ſtollen doth not exceed the value of 12. pence, and that is not felony.

From the Deſcription and Diviſion of Larceny, I proceed to propoſe theſe following Queries, with Reſolutions on them.

Quæſt. Whether Larceny can be committed, where there is a Bailement, or Delivery, by the owner of the thing?

Reſp. Larceny is perpetrated by an actual taking: for an Indictment, *Quod felonice abduxit* is not good, becauſe it wanteth *cæpit*. By taking, and not Bailement or delivery, for that is a Receipt, and not a taking: and therewith agreeth *Glanvil*, *Furtum non eſt ubi initium habet detentionis per dominum rei*; But this Rule of *Glanvil* has its exceptions, as appears by theſe Caſes in our Law. If a Carryer hath a bale or pack of Merchandiſe delivered unto him to carry it to an appointed place, and after he take the whole pack *animo furandi*, this is Larceny: for the delivery had taken his effect, and the privity of the Bailement is determined; ſo if he open the pack, and take any thing out * *animo furandi*, 'tis Larceny.

Lib. 10. c. 13.

Co. 3. Inſt. 107. 13.E. 4.9.

*Furtum ſine affectu furandi, non committitur. Juſt. 4. 1. 7.

If a Taverner ſet a piece of plate before a man to drink in it, and he carry it away, this is Larceny: for it is no Bailement, but a ſpecial uſe to a ſpecial purpoſe.

13.E. 4.9. Perkins ſect. 191.

To conclude, our Law does make a diſtinction between a Poſſeſſion and a Charge, for

for when I deliver goods to a man, he hath the poſſeſſion of the goods, and may have an Action of Treſpaſs, or an Appeal, if they be taken or ſtoln out of his poſſeſſion. But my Butler or Cook, that in my houſe hath charge of my veſſel or plate, hath no poſſeſſion of them, nor ſhall have an Action of Treſpaſs or an Appeal, as the Baily ſhall, and therefore if they ſteal the plate or veſſel, it is Larceny: And ſo it is of a ſhepheard, for things be *in onere*, *& non in poſſeſſione Promi*, *Coci*, *Paſtoris*, *&c.* 21. H. 7. 15, 2, 12. H. 7. 15. a. 3 H 7. 12. Cro. 1. part *Holiday.* vers. *Hickes.* 638.

Whether of goods found and converted *animo furandi*, Larceny can be committed? Quæſt. 2.

If one looſe his goods, and another find them, though he convert them *animo furandi*, to his own uſe, yet it is not Larceny, for the firſt taking is lawful. Reſp.

So if one find Treaſure Trove, Waif, or Stray, and convert them *cum affectu furandi* it is no Larceny, both in reſpect of the finding, and alſo for that *Dominus rerum non apparet*: *And non eſſe*, *& non apparere tantundem valent quoad eum*, *cui non apparet.* 22. Aſſ. pl. 99. 22. c 3. Cor. 265.

Whether an Infant, that is under the age of diſcretion, can commit Larceny? Quæſt.

An Infant, until he be of the age of 14, which in Law is accounted the age of diſcretion cannot commit Larceny, or other felony; for the principal end of puniſhment is, that others by his example may fear to offend: But ſuch puniſhment can be no example to Infants, that are not of the age of diſcretion: Reſp. Co. Litt. 247. *b.* Co. 3. Inſt *f.* 4, & 108.

But

But it appears by *Lambard f.* 2. *nu.* 7. that the Law was heretofore thus: *Infans decem annorum furti reus censeatur.* But having given you a determination according to our Law, I will mention the Law of the *Romans* and *Greeks*.

1. The Civil Law: *Quæsitum est, an Impubes rem alienam amovendo, furtum faciat? Et placuit, quia furtum ex affectu furandi consistit, ita demum obligari eo crimine impuberem, si proximus pubertati sit, & ob id intelligat se delinquere.*

Just. 4. 1. 14. D. 47. 2. 23. De furtis.

Impuberem furtum facere posse, nisi jam dolis capax sit, Julianus lib. 22. Digest. scripsit. for *Ætatis habetur ratio in delictis.*

2. The Law of the *Greeks*: *Ælian lib.* 5. *cap.* 16. *Varr. Hist.* hath this story: When a certain Boy, who had stoln away a golden plate, that fell from *Diana's* Crown, was brought in Judgment before the *Areopagitæ*: Those Judges, caused *Cocke-Hall*, *Bones*, *Rattles*, and the golden plate to be laid before the Child, in whom perceiving an inclination again to the golden plate, rather then to the Rattles and other things more suitable to his childhood, without pitty to his Infancy, they condemned him to death, as a Sacrileger, thinking it fit to crop that sin and wickedness, which they discerned to be in him, being yet but in the blade, and herbe.

Quæst. 4. Whether a Feme Covert can be guilty of Larceny?

Resp. If a man and his wife commit Larceny joyntly, the feme can neither be principal nor

nor accessary, but it shall be wholly adjudged the husbands fact, because the Law intends her to have no will, in regard of the subjection and obedience she owes to her husband: But a woman by her self, without the privity of her husband, may commit Larceny or other felony, to become either principal or accessary: As if she steal goods, or receive thieves to her house, &c. and if the husband as soon as he perceives it, waive and forsake their company and his own house, in this case the womans offence makes not felony in the Baron. But if the Baron commit felony, his wife not ignorant of it, may keep his company still notwithstanding, and not be declared accessary.

Stamford. 26. 2. E. 3. Cor. 160. *Fitzh.* The Womans Lawyer lib. 3. sect. 43.

Note, that a woman cannot be thief of her husbands goods, if she take and give them away, the Receiver is no felon.

Stamford lib. 1. c. 19.

Whether Larceny can be committed of a thing, that is delivered by Replevin.

Quære 5.

If a man seeing the horse of B. in his pasture, and having a mind to steal him, comes to the Sheriff, and pretending the horse to be his, obtaineth the horse by Replevin, yet this is a felonious and fraudulent taking, as it was resolved by the Judges, as *Catlin* Chief Justice reported in the Kings Bench *Pasch.* 15. for the Replevin was obtained *in fraudem Legis*; *And fraus Legi fit, ubi quod fieri noluit, fieri autem non vetuit, id fit.*

Resp.

Co. 3. Inst. 108. Co. 2. Inst. 242. Co. lib. 13. *Sprat* and *Hitalts.*

Whether the removal of things *felleo animo*, from one room to another, in the same house, can be Larceny?

Quære 6.

The removing of things taken, though they

Resp.

they be not carried away, is Larceny as if a Guest take the coverlet or sheets of his bed, and rising before day, take the coverlet or sheets out of the chamber, where he lay, into the Hall, to the intent to steal them, and went to the stable, to fetch his horse, and the Hostler apprehended him, and this was adjudged Larceny: and the coverlet or sheets were carried away, to the Hall, albeit they were still in the house of the owner.

21. Ass. Pl. 39. Co. 3. Inst. 108. & 109.

So if a mans horse be in the close, and one taketh him, and as he is carrying him away he is apprehended, before he getteh out of the close, yet this is sufficient to to make it Larceny.

Justice *Dalison's* Report.

Quære 7. Whether Larceny can be commited of personal goods, that savour any thing of the Realty?

Resp. Of personal goods, if they savour any thing of the Realty, no Larceny can be committed, as taking apples out of an Orchard, growing upon the tree, or grass standing on ground, *&c.* though they be taken with a felonious intent, is not felony, for that they are parcel of the freehold: But if the owner cut the grass, or gather the fruit, then Larceny may be committed of them.

So it is of a Box or Chest with Charters, no Larceny can be committed of them, because the Charters concerne the Realty, and the Box or the Chest, though it be of great value, yet shall it be of the same nature, the Charters be of: *Et omne majus dignum trahit ad se minus.*

10. E. 4. 14. Co. lib. 8. *Calveys* Case. 33. *b.*

Whether

Whether Larceny can be committed of Winding sheets about dead Bodies? Quære 8

At the Assizes at *Leicester*, the Case was this: One William Haine had in the night digged up the Graves of divers several persons and took the Winding sheets from the Bodies, and buried the Bodies again: and Sr. *Edward Coke*, advising hereupon for the rareness of the Case, consulted with the Judges at Serjeants-Inn in *Fleet street*, where they all resolved, That *although the dead Body is not capable of any property, yet the property of the sheets must be in some body, and therefore in the Executors, Administrators, or other owner of them: And according to the Judges resolution, he was indicted of felony at the next Assizes, but the Jury found it but petit Larceny, for which he was whipped, as he well deserved. Resp. 10. *Jac.* *Regis*; *Haynes* Case. **Mors est, cum quis è vivis excessit, qua jus omne extinguitur quod personæ coheret.*

Whether a man may commit Larceny of his own goods? Quære

If a man doth Baile or send his goods to another, although he hath the general property, yet may he commit Larceny of them, by the felonious taking and carrying them away, and in Judgment of Law, is said in this Case to take the goods of another: For the Bailer hath *Jus proprietatis*, and the Bailee hath *Jus possessionis*, or a special property. But let us see what the Civil Law saies in such Cases. Resp. 7. H. 6. 43: Cro. 1. part. *Staford. Vide Poole.* Co. 3. Inst. f. 110.

Aliquando etiam suæ rei furtum quis committit: veluti si debitor rem, quam Creditori pignoris causa dedit, subtraxerit. Inst. 4. 1. 12.

Si

Si is qui rem commodasset, eam rem clam abstulisset, furti cum eo agi non potest, quia suam recepisset, & ille commodati liberatus esset. Hoc tamen ipsa accipiendum est si nullas retinendo causas is cui commodata res erat, habuit. Nam si impensas necessarias in rem commodatam fecerat, interfuit ejus potius per Retentionem eas servare, quam ultro commodati agere. Ideoque furti actionem habebit.

ff. D. 47. 2. 99. De Commodato.

Thus much of Larceny.

1. *Of Robbery.*

Robbery is (saies *Coke*) a felony by the Common Law, committed by a violent assault, upon the person of another, by puting in fear, and taking from his person his money or other goods of any value whatsoever: Or it is (saies another) a felonious taking away of another mans goods from his person or presence, against his will, putting him in fear, and of purpose to steal the same goods. We call it *Roberia, & Rapina*, and the Thief *Raptor*.

Out of which descriptions, the Reader may observe these special circumstances: 1. That itis not Robbery, unless the party be put in fear, as by assault and violence; And this circumstance of fear, maketh the difference between a Robber and a Cut-purse: both take it from the person, but this latter takes it *clam & secrete*, without assault, and putting in fear, The lattter by violent assault, and putting in fear.

5. Eliz. Dyer 224. b.

2. That the word (*taking*) necessarily implyeth

implyeth that the Robber muſt be in poſſeſſion of the thing ſtoln; for example, If the bag or purſe of the true man be faſtned to his girdle, *&c.* and the Robber more eaſily to take the bag or purſe, do cut the girdle, whereby the bag or purſe, falleth to the ground, this is not taking, for the Thief had never any poſſeſſion thereof; but if the Robber had taken up the bag or purſe, and in ſtriving had let it fall, and never took it again, this had been a taking, becauſe he had it in his poſſeſſion; for the continuance of his poſſeſſion is not required by Law. Co. 3. Inſt. f. 69.

3. Though Robbery is ſo called, becauſe the goods are taken de la robe, from the Robe, that is from the perſon; yet if the true man ſeeking to eſcape for the ſafeguard of his money, caſt it into a buſh, which the Robber perceiving; This is a taking in Law from the perſon, becauſe it is done at one time. 14. E. 3. Cor. 115.

But, the *Quære* may be, Whether the Thieves reception only by ſuch a taking in Law, as to make it Robbery? It is anſwered, That a Thief's reception will make it Robbery; As if Thieves rob a true man, and find but little about him, take it, this is an actual taking, and by means of death, compel him to ſwear upon a book to fetch them a greater ſum, which he doth, and deliver unto them, which they receive, this is a taking in Law by them, and adjudged Robbery; for fear made him to take the oath, and fear continuing, made him bring the money, which amounteth to a taking in Law. 44. E. 4. 14. 4, H. 4. 2.

4, and

Co. lib. 3. f. 12. Allen pl. 39. Just. 4. 2. De vi bonorum raptorum.

Touching Robbers take somewhat of the Civil Law; *Qui vires alienas rapit, tenetur quidem etiam furti. Quis enim magis alienam rem invito domino contrectat, quam qui vi rapit?*

D. 47. 8. 3. De restitutione rei.

Non prodest ei qui vi rapuit, ad evitandam pœnam si ante judicium restituat rem quam rapuit: Multo minus (saies *Gothofredus* on this Text) *si pœniteat post delictum; vere enim ad evitandam pœnam sola pœnitentia sufficit. Cur? plus est rem restituere, quam pœnitere, & ita tenent Doctores omnes communiter.*

Thus much of the offence called in our Law Robbery.

3. *Burglary.*

Touching *Burglary*, there are 3 matters worthy of observation: *viz.* 1. The Etymology or origination of the word. 2. Its Definition: 3. Resolutions concerning this offence.

1. The Etymology.

The word *Burglary*, is derived of two words *Burgh* and *Laron*, *Burgh* signifying an House, and *Laron* signifying a Thief, as it were a House Thief.

Co. lib. 4. f. 39. *Brooke's* Case.

This crime, according to the acceptance of our Common Law is thus defined.

It is when one breaketh and entereth into the house of another in the night, with a felonious intent to rob or kill, or to do some other felony; in which cases, although he carry

carry away nothing, yet it is felony, for which he ſhall ſuffer death.

The Reſolutions that are given upon this offence, are theſe following.

1. Touching fraction and entry: If the door of a manſion houſe ſtand open, and the Thief enter into the houſe with a purpoſe to ſteal, this is a breaking of the houſe in Law, and no Burglary, becauſe there muſt be an actual breaking, for the words of the Indictment are, *Felonice & Burglariter fecit, &c.* which are to be underſtood of an actual breaking of the houſe, and not of a breaking in Law. So it is, if the window of the houſe be open, and the Thief with a hook, or other engine draweth out ſome of the goods of the owner: this is no Burglary, becauſe there is no actual breaking of the houſe. But if the Thief breaketh the glaſs of the window, and with a hook or other engine draweth out ſome of the goods of the owner; this is Burglary, for there was an actual breaking of the houſe. 4. The Reſolutions. Co. 3. Inſt. f. 64.

If divers come in the night to do a Burglary, and one of them breaketh and enter, the reſt of them ſtanding neer to the door, or about other part of the houſe, *&c.* to watch that no help ſhall come to defend the owner, this is Burglary in all. 13. H 4. 13.

But ſometimes Burglary may be committed by entry without any breaking: For example; if a ſervant will conſpire with other men to rob his Maſter, and to that intent

he openeth his Masters doors and windows in the night for them, that they come into the house by that way, this is Burglary in the strangers, and the servant is a thief, but no Burglar. And this was the opinion of *Manwood* Chief *Baron* of the *Exchequer*, at the Quarter Sessions holden at *Canterbury* in January 1579. 21. *Eliz.*

2. *Touching Mansion houses.*

If upon accident a man and all his Family are out of the house, and one in the *interim* breakes the house, and commit felony, it is Burglary, although neither the owner nor any of his Family is in the house, for the Indictment of Burglary is *Domum mansionalem, &c. fregit, &c.* and this is *domus mansionalis*: And so it was resolved 38. of *Eliz.* where a man hath two mansion houses, and servants in both, and in the night when the servants are out, *&c.* the house is broken, tis Burglary.

Co. Lib. 4. Brokes Case. f. 39.

But whether a Church, a Booth in a Fair, or a Chamber of an Inns of Court, may be termed *Domus mansionalis*? It is answered;

1. As to a Church: If a man do break and enter into a Church in the night with intent to steal, this is Burglary, and Sacriledge; for *Ecclesia est domus mansionalis Omnipotentis Dei.*

Concerning this horrible crime of Sacriledge, I shall present some learning out of *Justinian* and *Seneca.*

Sunt Sacrilegi qui publica Sacra compilaverunt.

verunt. At qui privata Sacra, vel Ædiculas incustoditas temptaverunt, amplius quam fures, minus quam Sacrilegi, merentur. D. 48. 13. 9. 1. Qui sunt Sacrilegi vel non.

Quisquis id, sayes Seneca, quod Deorum est, sustulit & consumpsit, atque in usum suum convertit, Sacrilegus est.

Sacrilegii pœnam debebit Proconsul pro qualitate personæ, proque rei Conditione, & temporis, & ætatis, & sexus, vel severius vel clementius statuere. Et scio multos & ad bestias damnasse Sacrilegos: nonnullos etiam vivos exussisse, alios vero in furca suspendisse. D. 48. 13. 6. Sacrilegi capite puniuntur. D. 48. 13. 9. Pœnas Sacrilegii.

2. *As to a Booth or Tent.*

A Tent or Booth in a Fair or Market, is not *Domus mansionalis*, but of another name or kind; but that is provided for by the Statute 5. E. 6. c. 9. whether the robbery be done in the night or in the day, the owner, &c. being within the same, sleeping or waking.

3. *As to Chambers, belonging to Inns of Court.*

A Chamber of an Inns of Court, or Chancery broken open, is said to be *Domus mansionalis* of him who is the owner of the said Chamber. Cro. 3. part. Evans and Finchis Case.

Thus much touching the Mansion houses.

3. *Touching the intention of the Party.*

If a man be Indicted, that he in the night-time did feloniously break the house of *I. S. ad verberandum ipsum I. S.* this is no Burglary, because it was but to beat, and not to kill; But if it were *ad interficiendum I. S.* then it is Burglary, though he never touched him, for the intent must be to commit felony, and not trespass or other thing, that is not felony.

13. H. 4. 7.

4. *Touching that which is perpetrated* In fraudem Legis.

If Thieves come in the night with hue and cry, pretending that they be robbed, and shall require the Constable to search for the felons, and whilst he goeth with them into some mans house, they bind and rob the Constable and dwellers, this is Burglary; for in judgment of Law, it is their act; and that which is done *in fraudem Legis*, the Law giveth no benefit thereof to the Party.

Co. 3. Inst. f. 64.

You see by what has been said before, that Burglary the Common Law restrains to a robbing of a house, by night or breaking in, with intent to rob or to do some other felony; but the like offence committed by day, we call House-breaking, or Robbing, (and not Burglary) and this kind of felony is provided for by the Stat. of 39. *Eliz.* That if any man shall break a house by day, and

39. Eliz. c. 15.

and take away thence money or goods, to the value of five ſhillings, or more in any part of the dweling houſe, or Out-houſe, belonging to the ſame, though no perſon be therein, for this felony he ſhall loſe the benefit of his Clergy; ſo as for this offence the party ſhall ſuffer death, as in caſe of Burglary

Upon this Law, happened this Caſe following:

Evans and *Finch* were arrigned at the Gaole delivery of New-Gate: for that they about 12. a clock in the fore-noon, brake open *Domum manſionalem Hugonis Audeley*, in the Inner Temple, no perſon being in the ſaid houſe, and ſtole from thence 40. pounds. And upon evidence it appeared, that the ſaid *Evans* by a ladder climbed to the upper window of the ſaid *Audeley*'s chamber, and took out thereof the ſaid 40. pounds: And that the ſaid *Finch* ſtood upon the ladder in the view of the ſaid *Evans*, and ſaw *Evans* in the chamber, and was aſſiſting to the committing of the ſaid robbery, and took part of the money. And all this matter being found, it was adjudged, becauſe the ſaid *Finch* did not enter into the chamber, that he was not within the Statute of 39. *Eliz.* which takes away Clergy, where an houſe is broken open, and the robbery is above the value of five ſhillings, no perſon therein, that he ſhould have his Clergy, which was allowed him. And as for *Evans* the ſpecial verdict found, that he was in

Cro. 3. part. *Evans* and *Finches* Caſe.

the chamber of *Hugh Audeley*, in the Inner Temple, and that the robbery was committed between 12, and one of the clock in the day time, no person being within the chamber at the time of the breaking thereof, but that divers persons were in the Inner Temple Hall, and in other places of the house: And whether this be a breaking open the house, and taking of goods above the value of five shillings; *nulla persona*, being within the house, and within the said act of 39. *Eliz.* they prayed the discretion of the Court? And it was resolved upon this special verdict (being removed by *Certiorari* into the Kings Bench, and the prisoner removed by *Habeas corpus*) that this breaking open the chamber, and taking 40. pounds out thereof, *nulla persona* being therein (although there were divers persons in other parts of the house) was within the Stat. of 39. *Eliz.* which takes away Clergy from such offenders: Wherefore Clergy was denyed to the said *Evans*, and Judgment given in the Kings Bench, that he should be hanged.

Thus much of *Burglary*, and likewise of House-breaking.

4. Pyracy.

Co. Lit. 391. *a.* 3. Inſtit. f. 113.

The word *Pyrat*, in Latine *Pirata*, is derived from the Greek word Πειρατης, which again is fetcht from Πειραν, *a transeundo mare*, of roveing upon the Sea, and therefore in

in Engliſh a *Pyrate* is called a Rover, and a robber upon the Sea.

Having ſhewed the Etymology, I propound theſe Queſtions with their reſolutions touching Piracy.

Whether Piracy were anciently treaſon? Qu. 1.

Before the Statute of 25. E. 3. c. 2. *De proditionibus*, if a Subject had committed Piracy upon another, this was holden to be Petit treaſon, for which he was to be drawn and hanged: becauſe *Pirata eſt hoſtis humani generis*, and it was *contra Ligeantiæ ſuæ debitum*; but ſince the aforeſaid Statute, this is no treaſon in the caſe of a Subject. Reſp. 40. Aſſ. Pl. 25.

Whether Piracy can alter property? Qu. 2.

Piracy does not change property no more then theft at Land. *Hobart*'s Reports *f.* 78. Reſp.

When goods are tortiouſly taken upon the Sea by Piracy, it gaineth not any property in them againſt the owner; and being ſold on the Land, unleſs it were in Market overt, doth not alter the property. Cro. 1. part. *Anonymus f.* 685.

The Civil Law ſpeakes thus:

A Piratis, aut latronibus capti, liberi permanent. D. 49. 15. 19. 2.

Qui a latronibus captus eſt, ſervus latronum non eſt, nec poſt liminium illi neceſſarium eſt. D. 49. 15. 24.

Piratæ, quæ capiunt, non mutant dominium. Grotius l. 3. *c.* 9. *n.* 16. *De jure belli.*

Whether Attainder for Piracy doth work corruption of blood, or forfeiture of Lands? Qu. 3. Reſp.

If Piracy be tryed before the Lord *Admiral* in the Court of the *Admiralty*, according to the Civil Law, and the delinquents

there attainted, yet ſhall it work no corruption of blood, nor forfeiture of his Lands, otherwiſe it is, if he be attainted before Commanders by force of the Statute of 28. *H.* 8. *c.* 15.

Qu. 4. Whether a Pardon of all felonies ſhall extended to *Piracy?*

Reſp. About the end of the Reign of Queen *Elizabeth*, certain Engliſh Pirates that had robbed on the Sea Merchants of *Venice* in amity with the Queen, being not known, obtained a Coronation Pardon, whereby amongſt other things, the King pardoned them all felonies: It was reſolved by all the Judges of *England*, upon conference and adviſement, that this did not pardon the Piracy; for ſeeing it was no felony, whereof the Common Law took Conuſance, and the Stat. of 28. *H.* 8. did not alter the offence, but ordained a Tryal, and inflicted puniſhment; therefore it ought to be pardoned eſpecially, or by words, which *tantamount*, and not by the general name of felony, and according to this Reſolution, the delinquents were attainted and executed. Thus much of *Piracy.*

Co. Lit. 39. *a.*

Hill. 2. *Jac. Regis.*

5. *Burning of Houſes.*

Burning is a felony at the Common Law, committed by any that maliciouſly and voluntarily in the night or day, burneth the houſe of another.

Co. 3. Inſt. *f.* 66.

Out of which we may obſerve two circumſtances. First;

First; To make it felony, it muſt be done with malice and will; for if it be done by miſchance, or negligence, it is no felony. But whether the Law doth ſometime imply that the houſe was burnt maliciouſly, and voluntarily, may be a *Quære?* It is anſwered, it does: As if one intend to burn the houſe of A. only, and not the houſe of B. and yet in the burning the the houſe of A. the houſe of B. is burnt, in this caſe the burning of the houſe of A, is felony, becauſe it proceeded of the malicious and voluntary burning of the houſe of A, and the event ſhall be coupled to the cauſe, which was voluntarily and malicious: And the rule is, *Involuntarium ex voluntario orium habens, moraliter pro voluntario habetur.*

Co 3. Inſt. *f.* 67. *Plowd.* Com. *f.* 475.

Secondly; to make it felony, it muſt be the houſe of another, and not his own houſe: As for example:

One *W. Holmes* was indicted in *London*, for that he being poſſeſſed of an houſe in *London*, in *Throgmorton* ſtreet, in ſuch a ward for ſix years, the remainder to *Iſ.* for three years, the Reverſion to the Corporation of *Haberdaſhers* in fee: He *vi & armis felonice, voluntarie, & malitioſe igne combuſſit, &c.* his own houſe: Upon this being arraigned at *New-Gate*, he was found guilty: add before Judgment this Indictment was removed by *Certiorari* into the Kings Bench, and being argued by *Grimſton*, that it was not felony.

Cro. 3. part. *Holmes's* Caſe. *f.* 377.

By *Richardſon*, *Jones*, and *Berkeley* it was held

held that it was not felony to burn an house, whereof he is in possession, by vertue of a Lease for years: For they said, that burning of houses is not felony, unless that they were *ædes alienæ*: And therefore *Britton*, and *Bracton* mention that is felony to burn the house of another: and the Year-Books and *Co. lib.* 11. *Powlters* Case, which say, that burning of houses generally are to be intended *de ædibus alienis*, & *de non propriis*: And although the Indictment be *ea intentione ad comburendum felonice*, &c. yet intent only without fact, is not felony: Also *Barkeley* and *Jones* held, that it cannot be said *vi & armis*, when it is in his possession; and therefore it was resolved that it was not felony, wherefore he was discharged thereof: But because it was an exorbitant offence, and found, they ordered that he should be fined 500. pounds to the King, and imprisoned during the Kings pleasure, and should stand upon the Pillory, with a paper upon his head, signifying the offence at *Westminster*, and at *Cheap-side*, upon the Market day, and where he committed the offence, and should be bound with good sureties to his good behaviour during life.

22 & 23. *Car.* 2. *nunc Regis.* Note, there is a late Act made, to prevent the malicious burning of houses, Stackes of Corn and Hay, and killing and maiming of Cattel.

Touching burning, the Civil Law speaks thus:

D. 47. 9. 9. *Qui ædes acervumque frumenti juxta domum*

num positum combusserit, vinctus verberatus igni necari jubetur, si modo sciens prudensque id commiserit. Si vero casu, id est, negligentia, aut noxiam sarcire jubetur, aut si minus idoneus sit, levius castigatur.

Si fortuito incendium factum sit, venia indiget, nisi tam lata culpa fuit, ut Luxuriæ, aut dolo sit proxima: Hitherto of criminal Pleas, that are perpetrated against the King and Common-wealth mediately, but *principaliter in singulas personas.* D. 49. 9. 11.

I proceed to those that immediately touch the King, and his Crown; and they are:

1. *High Treason.*

Crimen læsæ Majestatis.

Stamford telleth us that the King is the Preserver, nourisher and defender of all his People, and that by his great travel, study and labour, his People only enjoy their Lives, Lands and Goods: And as the body of Man cannot live without a Head, but will fall to the ground, so the Realm cannot be governed without a Head, which is the King. Agreable to that of *Seneca, Ille est vinculum, per quod Respublica cohæret, &c.* And therefore we his loving Subjects, are obliged to watch for that him, wakes for us; And, *primum virtutis opus est, servare servantem cætera.* If so, what an abominable thing must it be, to be a violator of Kingly Majesty: Crime de Majesty (sayes the *Mirror*) est un peche horrible fait al Roy, &c. *Tacitus* calls *Crimen Majestatis, vinculum, & necessitatem silendi, Omnium accusationum complementum:*

mentum: And in the Civil Law, it is ſaid thus: *Proximum Sacrilegio crimen eſt, quod Majeſtatis dicitur, id eſt, crimini quo divina Majeſtas pulſatur.*

D. 48. 4. 1.

High Treaſon does extend to ſeveral parts or kinds, *viz.* Death, to Violation, to Leaving of Warr, to Adhering to the Kings Enemies, to Counterfeiting the Great Seal, Privy Seal, and the Kings Coyn, to the bringing into this Realm counterfeit Money to the ſimilitude of His Majeſties Coyn, of theſe ſeveral parts in their order.

1. *Touching Death.*

1. To compaſs or imagine the death of the King, is *Crimen leſæ Majeſtatis*, as appears by *Britton* and *Fleta*.

Britton thus: Graund Treaſon eſt a compaſſer noſtre mort.

Fleta hath this words: *Si quis mortem Regis auſu temerario machinatus fuerit, &c. quamvis voluntatem non perduxit ad effectum.*

To depoſe the King, or to take the King by force and ſtrong hand, and to impriſon him untill he hath yeilded to certain demands; this is a ſufficient overt Act, to prove the compaſſing and imagination of the death of the King: for this is upon the matter to make the King ſubject, and to deſpoil him of his Kingly Office of Royal Government. And ſo it was reſolved by all the Judges of *England Hill*, 1. *Jac. Regis*, in the

the Caſe of the Lord *Cobham*, Lord *Gray*, *Watſon* and *Clarke* Seminary Prieſts.

So if divers conſpire the death of the King, and the manner how, and thereupon provide weapons, powder, poyſon, aſſay harneſs, ſend Letters, *&c.* or the like for execution of the Conſpiracy, this is a ſufficient overt act to prove the compaſſing and imagination of the Kings death.

If any man ſhall attempt to make himſelf ſo ſtrong, that the King ſhall not be able to reſiſt him, he is guilty of Rebellion. In the like manner, the Law interpreteth that in every Rebellion there is a machination againſt the life of the King and his depoſing: For a Rebel will not ſuffer that King to live or reign, which may afterwards puniſh or revenge ſuch the treaſon or Rebellion. Theſe things are confirmed:

1. by the *Imperial* or Civil Law, whereby to do any thing againſt the ſafety of the Prince is holden to be treaſon. *Vide* D. 48.4. 1. *ad Legem Juliam Majeſtatis.*

2. By the force of reaſon, becauſe it cannot be that which hath once given Law to the King, ſhould ever permit that the King ſhould recover his former Authority, or live, leaſt at any time he ſhould recover it.

3. By examples drawn out of our *Engliſh* Hiſtory, as of *Edward* the Second, and *Richard* the Second, who being by force of Armes gotten by Subjects into their power, were not long after depoſed alſo, and made away.

The

The Civil Law; *Quamvis regulariter ratione ſolius conſenſus nemo ad pœnam obligatur; ſed ſecuto demum actu: Aliud tamen obtinet in crimine in Principe, in quo voluntas, punitur; ſed intellige talem voluntatem, cum quâ conjunctum eſt initium facti, i. e. factio, vel conjuratio: Sola enim & nuda voluntas puniri nequit.*

Note, that there is difference taken by our Law between felony and High treaſon; for it is not felony, unleſs there be ſome act done: *Non efficit conatus, niſi ſequatur effectus:* But if one compaſs or imagine the death of the King, who is the Head of the Common-wealth, and declares his compaſſing or imagination, by words or Writing, it is High treaſon: *Doct. and Stud. lib. 2. cap. 41. Co. 3. Inſt. f. 5. 12. H. 8. 36. b. 13. H. 8. 13. Bendlones Rep. Smith v. Spurle.*

And therefore theſe following words were adjudged High treaſon, *viz.*

If the King dye without Iſſue Male, that he would be King: and alſo the party arraigned ſpake, that if the King ſhould commit him to Priſon; that he would kill him with his dagger.

So one *Crohagan*, an Iriſh man was arraigned of Treaſon; for that he being the Kings Subject at *Lisbone* in *Spain*, uſed theſe words, I will kill the King (*innuendo Dominum* Carolum *Regem Angliæ*) if I may come unto him; and that in Auguſt 9. *Car. Regis*, he came into *England* for the ſame purpoſe. To this he pleaded Not-guilty,

Cro. 3. part. *Crohagans* Caſe. *f.* 332.

and

and was tryed by a Jury of *Middleſex*, and it was directly proved by two Merchants, that he ſpake theſe words at *Lisbone* in *Spain*, in great heat of ſpeech, with Captain *Baske*, and added theſe words, Becauſe he is an Heretick; and for that his traiterous intent and the imagination of his heart, is declared by theſe words, it was held High treaſon by the courſe of the Common Law, and within the expreſs words of the Statute of 25. *E.* 3. And he coming into *England*, and being arrreſted by Warrant for this cauſe, moſt inſolently put his finger into his mouth, and ſcornfully pulling it out, ſaid, I care not this for your King, *&c.* all which ſpeeches and actions, though he now denyed, the Jury found him guilty, whereupon he had Judgment accordingly. He confeſſed that he was a *Dominican* Fryer, and made Prieſt in *Spain*. And although this, and his returning into *England*, to ſeduce the *Liege-People*, were Treaſon by the Stat. of 23. *Eliz.* yet the Kings Atturney ſaid, he would not proceed againſt him for that cauſe, but upon the Stat. of 25. *E.* 3. of Treaſon.

So one *Henry Challercomb* was indicted of Treaſon for words, and was found guilty, and executed.

So *John Williams* was alſo indicted, found guilty, and executed, for writing a Treaſonable Book, called *Balaam Caſe*. Theſe two laſt Preſidents you may ſee cited in *Pyne's* Caſe, in *Crokes* third part of his *Reports*.

It

It is commonly ſaid, That bare words may make an Heretick, but not a Traitor, without an overt Act: And therefore to make compaſſing by bare words or ſayings, High treaſon, it muſt be by ſome particular Statute, ſuch were the Statutes of *26. H. 8. c.* 13. 1. *E. 6. c.* 13. 1. *& 2. Phil. and Mar. c.* 9. 1. *Eliz. c.* 6. 13. *Eliz. c.* 1. *&* 14. *Eliz. c.* 1. but all theſe are either repealed or expired: yet compaſſings or imaginations againſt the King by word, without an overt Act, is an High miſpriſion.

Co. 3 Inſt. *f.* 140.

Note, that there is a Law made for the Preſervation of His now *Majeſtie*'s Perſon and Government, againſt Treaſonable and ſeditious practiſes (during his natural life, which God long continue) proceeding from Printing, Writing, Preaching, or malicious and adviſed ſpeaking.

13. *Car.* II. *Reg. c.* 1.

Note further, that to calculate or ſeek to know by ſetting of a figure, or Witchcraft, how long the King ſhall Reign or live, is no Treaſon, for it is no compaſſing or the imagination of the death of the King, within the Stat. of 25. *E.* 3. And this appeareth by the Judgment of the Parliament in 23. *Eliz.* whereby this offence was made felony, during the life of Q. *Elizabeth*, which before was puniſhable by fine and impriſonment.

Co. 3. Inſt. *f.* 6.

But *Scipio Gentilis* in his firſt Book *De conjuratione* ſayes; *De vita Principis inquirere præſertim per Aſtrologos capitale eſſe: neque hoc ſolum, ſed etiam de ea dubitare, vel deſperare*

ſperare pro crimine Majeſtatis habitum eſſe; ſi ea deſperatio indiciis eſſet aliquibus patefacta.

Thus much of the *King* himſelf.

If any do compaſs or imagine the death of the Queen Conſort, or Prince, (the Kings Son being Heir apparent to the Crown for the time being) and declare it by ſome overt Act, the very intent is Treaſon, as in caſe of the King himſelf. 25. E. 3. c. 2. *De prodi-tionibus.*

If a man ſlay the *Chancellor*, *Treaſurer*, or the Kings Juſtices of the one Bench, or the other, Juſtices in Eyre, or Juſtices of Aſſize, and all other Juſtices aſſigned to hear and determine, being in their places doing their Offices: And the reaſon wherefore it is Treaſon in theſe Caſes is, becauſe ſitting judicially in their places (that is in the Kings Courts) and doing their Office in adminiſtration of Juſtice, they repreſent the Kings Perſon, who by his Oath is bound that the ſame be done. 25. E. 3. c. 2.

2. *Touching violation, or Carnal knowledge.*

To violate or to carnally know the Kings Companion, or the Kings eldeſt Daughter unmarried, or the Wife of the Kings eldeſt Son, and Heir apparent, is High treaſon. 25. E. 3. c. 2.

The reaſon that the eldeſt Daughter only is mentioned in Stat. of 25. E. 3. is for that for defaut of Iſſue Male, ſhe only is inheritable to Crown.

3. Touching War.

25. E. 3. c. 2. To levy War againſt our Lord the King is High treaſon: This was ſo by the Common Law, for no Subject can levy War within the Realm without Authority from the King; for to him it only belongeth. *F. N. B.* 113. *Co. lib.* 2. *Wiſemans* Caſe *f.* 15. *b.* In the Codes of *Juſtinian* is extant the Conſtitution of *Valentinian* and *Valens*; *Nulli prorſus nobis inſciis, atque inconſultis quorumlibet Armorum movendorum copia tribuatur: Huc pertinet illud Auguſtius: Ordo naturalis mortalium paci accommodatus hoc poſcit, ut ſuſcipiendi Belli auctoritas, atque Conſilium penes Principes ſit.*

If any levy War to expulſe Strangers, to deliver men out of Priſon, to remove Co. 3. Inſt. f. 9. ſellors, or againſt any Statute, or to any other end, pretending Reformation, this is levying of War againſt the King, becauſe they take upon them Royal Authority, which is againſt the King.

So if any with Strength and Weapons, in- Co. 3. Inſt. f. 10. vaſive and defenſive doth hold and defend a Caſtle or Fort, againſt the King and his Power, this is levying of War againſt the King within the Statute of 25. E. 3.

One *Thomas Benſted* was indicted and ar- Cro. 3. part. *Benſteds* Caſe. f. 583. raigned before ſpecial Commiſſioners of *Oyer* and *Terminer* in *Southwark*, wherein all the Juſtices and *Barons* were in Commiſſion, and preſent; at which time upon Conference with

with all the Justices, it was resolved;

First, that going to *Lambeth House* in warlike manner, to surprize the Arch-Bishop, who was a Privy Counsellor, (it being with Drums, and a multitude, as the Indictment was, to the number of 300. persons) was Treason. And,

Secondly, It was resolved by ten of the said Justices *seriatim*, that the breaking of a Prison, wherein Traitors be in Durance, and causing them to escape, was Treason, although the Party did not know that there was any Traitors there, upon the Stat. of 1, *H.* 6. c. 5.

And so to break a Prison, whereby Felons escape, is felony, without knowing them to be imprisoned for such offence.

Note, A Compassing or Conspiracy to levy War, is no Treason; for there must be a levying of War *de facto*.

4. *Touching Adhesion to the Kings Enemies.*

If a man be adherent to the Kings Enemies in his Realm, giving to them aid and comfort in the Realm, or elsewhere, it is High treason. 25. E. 3. c. 2.

Having given you the words of the Stat. 25. E. 3. I propose these Queries:

Whether the delivery of a Castle or Fort to an Enemy be an Adhering to the Kings Enemy? Qu. 1.

To deliver or surrender the Kings Castles Resp.

or Fort by the Kings Captain thereof to the Kings Enemy within the Realm, or without for Reward, &c. is an Adhering to the Kings Enemy, and consequently Treason declared by the Act of 25. E. 3.

Qu. 1. Whether the Aiding or succouring of a Rebel beyond Sea be Treason?

Resp. A, is out of the Realm at the time of a rebellion within *England*, and one of the Rebels doth fly out of the Realm, whom A, knowing his treason, doth aid or succour, this is no Treason in A, by the Stat. of 25. E. 3. because the Traitor is no enemy.

Co. 3. Inst. f. 10. 13. Eliz. Dyer f. 298.

Qu. 2. *Utrum Exteri, qui cum Subditis contra Principem militant, Rebelles sint habendi?*

Resp. An Enemy coming in open hostility into *England*, and taken, shall be either executed by *Marshal* Law or ransomed; for he cannot be indicted of Treason, for that he was never within the Protection or Ligeance of the King, and the Indictment of Treason saith, *Contra Ligeantiam suam debitam.*

Dyer 4. Mar. f. 145. a. Co. Lib. 7. Calvins Case.

But if a Subject joyn with a Foreign Enemy, and come into *England* with him, he shall not be taken prisoner here, and ransomed or proceeded with as an Enemy shall, but he shall be taken as a Traitor to the King.

13. Eliz. Dyer f. 298.

Whether an *English* Man born consulting with a Foreign Prince, to invade his Country, may be charged with High treason?

A Consultation was had concerning *John Story* Doctor of Law, the *Duke* of *Alva*'s Searcher, whether he, being an *English* Man born, who in *Brabant* had consulted with a

Cambdens Eliz. f. 144 & 145. An. 1572.

Foreign

Foreign Prince about invading his Countrey, and had shewed the means of Invasion, might have been charged with High treason? The skilfullest Lawyer affirmed that he might.

Whereupon he was arraigned, and being to be charged with Treason, for that (amongst other things) he had shewed to the *Duke* of *Alva's* Secretary the means to invade *England*, raise *Ireland* into rebellion, and excite the *Scots* to break into *England*, all at once: He refused to submit himself to Tryal, and to the Laws of *England*, and affirmed that the Judges had no power over him, for that he was not a Subject sworn to the Queen of *England*, but to the King of *Spain*. But he was condemned according to the ordinary forme of *Nihil dicit*, and suffered the death of a Traitor; for that no Man can shake off his Countrey wherein he is born, nor abjure his native soile, or his Prince at his pleasure; *Nemo Patriam in qua natus est, exuere, nec Ligeantiæ debitum ejurare possit.* With this Law doth concurre the Civil Law: *Origine propria neminem posse voluntate sua eximere manifestum est.*

Co. Lit. f. 129. a. 13. *Eliz.* Dier 280. Doctor *Story's* Case. Co. *lib.* 7. *Calvin's* Case. Cod. 10.

5. *Touching Fausonnery.*

If a Man counterfeit the Kings Great or Privy Seale, or his Money, it is High treason.

All antient Authors agree that this was High treason by the Common Law (as *Bracton*, *Britton*, *Fleta*, and the *Mirrour*.

The Forging of the Kings Coyn is High treason, without utterance of it; for by the

Act of 25. E. 3. the Counterfeiting is made High treaſon.

One *Morgan* and two others were indicted for Counterfeiting twenty Shilling Pieces of the Kings Coyn; and *Morgan* for uttering thoſe Pieces to the Kings Subjects, knowing them to be counterfeit; and being thereupon arraigned, he pleaded *Not guilty*. And evidence being pregnant againſt *Morgan*, he was found guilty, and the others were acquitted: And Judgment given that he ſhould be drawn and hang'd; but not to be quartered, according to the opinion of *Stamford* f. 182.

Cro. 3. part. *Morgans* Caſe 383.

Note, that by the Stat. of 5. *Eliz.* to clip, waſh, round, or file, for wicked lucre and gain is declared High treaſon. So by the Statute of 18. *Eliz.* 'tis enacted, that diminiſhing, ſcaling or lighting of the Kings Coyn within this Realm, is High treaſon.

5. *El. c.* 11.

18. *E. c.* 1.

Touching Money, the Civil Law ſpeaks thus:

Qui falſam monetam percuſſerint, ſi id totum formare noluerunt, ſuffragio juſtæ pœnitentiæ abſolvuntur. D. 48. 10. 19. *De falſa Moneta.*

Falſa moneta deprehenditur ex materia, pondere, & forma adulterina, Gothofredus.

Quicunque Nummos aureos partim raſerit, partim tinxerit, vel finxerit: ſi quidem liberi ſunt, ad beſtias dari: ſi ſervi, ſummo ſupplicio affici debent. D. 48. 10. 8.

6, and

6, and last: Bringing into the Realm Counterfeit Coyn.

If a Man bring false Money into this Realm counterfeit to the Money of *England*, knowing the Money to be false, to Merchandise or make payment, in deceit of our Soveraign Lord the King, and of his People, it is High treason.

But note, that the uttering of false Money in *England*, though the Person know it to be false and counterfeit to the Likeness of the Coyn of *England*, is no Treason within the Statute of 25. *E.* 3. unless he brought it from a Foreign Nation; for the words of the Statute are, Si Home apport faux Money en cest Realm.

Having related the several parts or kinds of Treason, within the Statute of 25. *E.* 3. I shall add these few Queries touching High treason, and so conclude.

Whether a mad Man may be guilty of High treason. Qu. 1.

The antient Law was, that if a mad Man had killed, or offered to kill the King, it was holden for Treason; and so it appears by King *Alfreds* Law, before the Conquest, and in *Beverleys* Case; for the King is *Caput & Salus Reipublicæ*, & *a Capite bona valetudo transit in omnes*, and for this cause Kings Persons are so Sacred, that none may offer them violence, without being guilty of High treason; *Et pereat unus ne pereant omnes.* Resp. Co. *lib.* 4. *f.* 124. *b.* *Beverleys* Case.

But now by the Statute of 25. E. 3. and by force of the words, *Fait compasser ou imaginer la mort*; he that is *Non compos mentis*, and totally deprived of all compassings and imaginations, cannot commit High treason, by compassing or imagining the death of the King: for *furiosus sola furore punitur*; and *furor* in the Civil Law is *continuata mentis alienatio, qua quis omni intellectu caret.*

Co. 3. Inst. f. 6. Co. Lit. 247. b.

If a Man commit Treason, and confesseth the same, or be thereof otherwise convict, if afterwards he become *de non sana memoria*, he shall not be called to answer; or if after Judgment he become *de non sana memoria*, he shall not be executed; for it cannot be example to others.

Co. 3. Inst. f. 4. Lib. 4. Beverleyes Case.

The Civil Law:

Culpam non admittit, qui sua mentis non est.

D. 48 9. 9. 2.

Si per furorem aliquis parentem occiderit, impunitus erit, Divi Fratres rescripserunt super eo, *qui per furorem matrem necaverat. Num sufficere, furore ipso eum puniri?*

Qu. 2.

Whether an *Alien* residing here, can commit High treason?

Resp.

Co. Litt. 192. a. Dyer 144. Co. lib. 7. Calvins Case. Co. 3. Inst. f. 4 & 5.

All *Aliens* that are within the Realm of *England*, and whose Soveraign are in amity with the King of *England*, are within the protection of the King, and do owe a Local or Topical obedience to the King, are within the Act of 25. *E.* 3. and if they commit Treason against the King, they shall be punished as Traitours, and the Indictment shall say *contra Legeantiæ debitum.*

Who-

Whether the killing of a Foreign Ambaſſadour reſiding here, be High treaſon? Qu. 3.

Albeit the malicious killing of an Ambaſſabour be *juſti belli cauſa*, and *contra jus Gentium*, yet the killing of him is no Treaſon, within the Stat. of 25. *E.* 3. until itl be ſo declared by Parliament, as it was in the Caſe of *Kerby* and *Algere*, who were attainted for the killing of *John Imperial*, Ambaſſadour from the State of *Genoa*; but that Declaration was taken away by the Statute of 1. *Mar.* Reſp. Co. 3. Iuſt. f. 8.

Whether an Ambaſſadour, which raiſeth Rebellion ahainſt the Prince to whom he is ſent, may enjoy the priviledge of an Ambaſſadour, and be not ſubject to puniſhment as an Enemy? Qu. 4.

Such an Ambaſſadour hath by the Law of Nations, and by the Civil Law of the *Romans*, forfeited all the Priviledges of an Ambaſſadour, and is ſubject to puniſhment. Reſp.

If a Foreign Ambaſſadour, ſayes *Coke*, committeth here in our Realm any crime, which is *contra jus Gentium*, as Treaſon, Felony, Adultery, or any other crime which is againſt the Law of Nations, he looſeth the Priviledge and Dignity of an Ambaſſadour, as unworthy of ſo high a Place, and may be puniſhed here as any other privete *Alien*, and not to be remanded to his Soveraign, but of courteſy. *Hill.* 14. *Eliz.* *The Biſhop of* Roſes Caſe. Co. 4. Inſt. f. 153. *Bulſtrodes* Reports. 3d part. The *King* v. March.

But if any thing be *malum prohibitum*, by any Act of Parliament, Private Law or Cuſtom of the Realm, which is not *malum in ſe jure Gentium*, nor *contra jus Gentium*, an Ambaſſadour

Embassadour residing here shall not be bound by any of them: but otherwise it is of the Subjects of either Kingdom, &c. And the reason why private *Aliens* are bound by our Acts of Parliament, Private Laws and Customs, is given by the learned *Grotius*, (*viz.*

Lib. 2. c. 2. nu. 5. De jure belli ac Pacis.

Quia ad gubernationem Populi moraliter necessarium est, ut qui ei vel ad tempus se admiscent, quod fit intrando territorium, ij conformes reddant ejus Populi institutis.

Qu. 5. Whether a Foreign Prince, by his dwelling and residing here, can commit Treason?

Resp. When a Foreign Prince comes with leave into *England*, he subjects himself under the Protection of the King of *England*, and as by well doing he enjoyes the benefit of the Laws, so by ill doing he is subject to the Equity thereof, according to that saying of the Lawers, He deserveth not the benefit of the Law, which offendeth against the Law. Otherwise better were the condition of a Foreign Prince offending in another Princes Kingdom, than his that reigneth well: He is thought also to be a Subject, though not originary yet temporary, because two absolute Princes in respect of Royal Authority, cannot be in one Kingdom at once; and therefore it is a received opinion of the learned in the Laws, A King without his own Dominions (except it be in an Expedition of War) is but a private Man; and consequently can neither confer, nor exercise Royalties.

Moreover it is said, that such a Prince by his offence looseth *merum Imperium*, his meer

and

and abſolute Soveraignty, and that ſuch are ſubject by their dwelling only and place of abode, might commit Treaſon, and that a Prince hath power or Juriſdict. over another Prince that is his equal as often as any hath ſubjected himſelf under the Judgment of his Equal either by expreſs words or Covert, Contract, or by offending within the Juriſdiction of his Equal.

Vide Cambdens Eliz. in 29. year of her Reign, touching the Queen of *Scots*.

2. *Miſpriſion of Treaſon.*

Touching Miſpriſion, 4 things are to be principally obſerved; The Etymology of the word, its Deſcription, its Diviſion, and the Puniſhment therefore.

1. The Etymology or Origination of the word:

Miſpriſion, cometh of the *French* word Meſpris, which properly ſignifieth neglect or contempt; for (mes) in Compoſition in the *French* ſignifieth mal, as *mis* doth in the *Engliſh* Tongue: as miſchance, for an ill chance, and ſo *Miſpriſe* is ill apprehended or known. Co. 3. Inſt. f. 36.

2. Its Deſcription:

In legal underſtanding Miſpriſion of treaſon, is either when one knoweth, that another hath committed treaſon, and will not diſcover him to the King or to the Councel, or to any Magiſtrate, but doth conceal the ſame; it is when one hath committed ſome hainous offence under the degree of treaſon.

3. Its Diviſion: Miſpri-

13. El. c. 2. As for example: It is Misprision of High treason in concealing of a Bull from the *Pope* of *Rome*.

Dyer f. 296 *Coyners Case.* So the receiving of one that hath counterfeited the Kings Coyn, and concealing of him, knowing him to have counterfeited the King Coyn, is but a Misprision.

But by the Common Law, concealment of High treason, was Treason, as appeareth in the Case of the Lord *Scrope* anno 3 *H.* 5. and by *Bracton lib.* 3. *f.* 118. *b.* & 119. *a.*

And with our Common Law, the words of *Isocrates* to *Nicocles* are agreable, *viz. Eadem pœna digni sunt supprimentes hujusmodi facinus, quæ facinerosi.*

2. Active, called *Crimen commissionis*, as in committing some heinous offence, under the degree of Treason; as when one fixes an old Seale of a Patent to a new Patent of Non-Residence, this is holden to be a Misprision of Treason only, for it is an abuse of the great Seale, and not counterfeiting of it.

37. *H.* 8. *Br.* Tit. Treason.

So if a man know Money to be counterfeit, and bring the same out of *Ireland* hither into *England*, and utter it in payment, this is but a Misprision, and no Treason.

Co. 3. Inst. *f.* 140.

So the compassings or imaginations against the King by word, without an overt Act, is a High Misprision.

14. The

4. The punishment of this offence.

In all Cases of Misprision of Treason, the party offendour shall forfeit his Goods and Duties for ever, and the profits of his Lands for terme of his life, and to be imprisoned during life.

From which punishment if any will save himself, that knoweth of any High treason, he ought with as much speed as conveniently he may, to reveal the same to the King, or some of his Privy Councel, or any other Magistrate.

Note, that in every Treason or felony, is included Misprision, and where any hath committed Treason or felony, the King may cause the same to be indicted, and arraigned, but of Misprision only, if he will.

3. *Robbing the Kings Treasure.* *Crimen peculatus.*

The Robbing the King of his Treasure, or Money, is accounted *Damnum Inestimabile*, for the Kings Treasure is the sinew of War, and the honour and safety of the King in time of Peace. Co. 3. Inst. f. 112. Co. litt. 90. b. 131. b.

The Civil Law doth accord with our Law in this point. *Pecuniæ nervus Reipublicæ, sine bello. Quæ ita? Imperium sine vectigalibus nullo modo esse potest.* Cicero. *Militares expensæ, & Hostium Incursiones multa regent diligentia, & non possunt sine pecuniam hæc agi.* N. 8. 2. 10. 2.

Fourscore and one persons, (whereof the Abbot of *Westminster* and 48 of his Monks were part) brake into the Receipt, and felo- Co. 4. Inst. f. 112.

niously

niously robbed the King of a hundred thousand pounds: All these fourscore and one were indicted of this felony, and committed to the *Tower* of *London*, &c. and this was the occasion of the new building of both parts of the *Exchequer*, which were before of antient building, and weak.

The punishment of this crime in the Civil Law, is this:

Peculatus pœna aquæ & ignis interdictionem, in quam bodie successit deportatio, continet. Ferro qui in eum statum deducitur, sicut omnia pristina jura, ita & bona amittit.

4. *Bribery.*

Crimen Repetundarum. Bribery (saies *Coke*) is a great Misprision, when any man in Judicial place takes any Fee or Pension, Robe or Livery, Gift, Reward, or Brocage of any person that hath to do before him any way, for doing his Office, or by colour of his Office, but of the King only, unless it be of meat, and drink, and that of small value, upon divers and grevious punishments.

Having given you a description of Bribery, I propose these Queries with Resolutions upon them; and then shew what the Civil Law saith touching Bribery, and Reward.

Quæst. Whether Bribery can be committed, although there be no suit depending *in foro contentioso*?

Resp. Bribery may be committed not only when a Suit dependeth *in foro contentioso*, but also when

when any in Judicial place doth any thing, *virtute* or *colore Officii*, though there be no Suit at all.

For example, if the Lord Treasurer for any gift or brocage, shall make any Customer, Controller, or any Officer, or Minister of the King, this is Bribery, for he ought to take nothing in that Case, by the Statutes of 12. *R.* 2. *c* 2. 5. *E.* 6. 5. 6. *Co. Litt. f.* 234. *a. Co.* 3. *Inst. f.* 154. *Hobarts Reports*, *Ray v.* Bishop of *Norwich f.* 75. but that he make all such Officers, and Ministers of the best and most lawfull Men, and sufficient for their estimation and knowledg. These Laws aforementioned, made *contra crimen Ambitus* are worthy to be known by all; but more worthy to be put in execution, for they prevent Bribery and extortion; They that buy, will sell.

Co. 3. Inst. *f.* 148.

Laws made *contra Ambitus.*

Whether this offence of Bribery can be perpetrated, by one that hath a Judicial place in the Ecclesiastical Court?

Qu. 1.

The Statute of 5 *E.* 6. *c.* 16. doth extend as well to Ecclesiastical Office as temporal, which concern the Administration and execution of Justice, and therefore any Chief Judicial Officer Ecclesiastical, taking any thing *virtute* or *colore Officii*, for any Office Ministerial or Judicial, is guilty of Bribery.

Resp.

Co 3. Inst. 148. Cro. 2. part. *Trevors* Case. *f.* 269.

Touching Gifts and Bribery, take notice what the Civil Law sayes:

Non in totum Xeniis abstinere debebit Proconsul, sed modum adjicere, ut neque morose in totum abstineat, neque avare modum Xenio-

1. *De Xeniis.*

rum

rum excedat; quam rem Divus Severus, & Imperator Antonius elegantissime epistola sunt moderati, cujus epistolæ verba hæc sunt: Quantum ad Xenia pertinet, Audi quid sentiamus. Vetus proverbium est, neque omnia, neque quovis tempore, neque ab omnibus. Nam valde inhumanum est, a nemine accipere, sed passim vilissimum est, & omnia avarissimum.

D. 4. 16. 6. 3.

Imo non est inhumanum. Nam & munera excæcant oculos sapientum, ac pervertunt verba Justorum: verum hic agitur (saies Gothofredus) de muneribus quæ dantur Proconsuli, ut hospiti, non ut Judici.

Et hic aperte Xenia: & ut appellat quoque hic Jurisconsultus, Xeniola, distinguuntur a dono & munere, seu munerum qualitate: Aliud ii est munus, aliud Xenion & Xeniolon.

2. De Repetundis. D. 48. 11. 3.

Lege Julia repetundarum tenetur, qui cum aliquam potestatem haberet, pecuniam ob judicandum, decernendumque acceperit.

D. 48. 11. 9.

Qui munus publice mandatum, accepta pecunia, rumperunt, crimine repetundarum postulantur.

5. Extortion.

Extortion is a Misprision by wresting, or unlawfully taking by any Officer by Colour of his Office, any money or valuable thing of or from any Man, either that is not due, or more then is, or before it be due, *Quod non est debitum, vel quod est ultra debitum, vel ante tempus, quod est debitum.*

Co. Litt. 368. b.

Of this crime it is said, that in no other

then

than Robbery; and another ſaith, that it is more odious than Robbery; for Robbery is apparent, and hath a face of a crime, but extortion puts on the vizor of vertue, for expedition of Juſtice and the like, and it is ever accompany'd with that grevious ſin of perjury; we call it in Latin *Crimen expilationis, ſeu concuſſionis.* Co. Lit. 368. b.

But the *Quære* may be whether Extortion and Exaction are all one? It is anſwered, They are not, for there is this difference taken between Exaction and Extortion: Extortion is where an Officer demandeth and wreſteth a greater ſumme or reward, than his juſt Fee: And Exaction is where an Officer or other Man demandeth and wreſteth a Fee or reward, where no Fee or reward is due at all.

6. Striking in the Kings Courts, where he reſides perſonally, or by Repreſentation.

If any Man in *Weſtminſter* Hall, or in any other Place, ſitting the Courts of *Chancery*, the Kings Bench, the Common Bench, the Exchequer, or before Juſtices of Aſſize, or Juſtices of *Oyer*, & Terminer, ſhall draw a weapon upon a Judge, or Juſtice, though he ſtrike not, this is a great Miſpriſion, for the which he ſhall loſs his right hand, and forfeit his Lands and goods, and his Body to perpetual impriſonment; The reaſon is becauſe it tendeth *ad impedimentum Legis terræ.* So it is if in *Weſtminſter* Hall, or any Co. 3. Inſt. f. 140. 22. E. 3. 13.

other Place, ſitting the ſaid Courts there; or before Juſtices of Aſſize, or *Oyer* and Terminer, and within the view of the ſame, a Man doth ſtrike a Jury, or any other with weapon, hand, ſhoulder, elbow, or foot, he ſhall have the like puniſhment; but in that caſe, if he make an aſſault, and ſtrike not, the offender ſhall not have the like puniſhment.

5. Eliz. *Dyer* 188.

One *Peter Cary* was indicted for drawing his ſword *in Aula Weſtm. ſedentibus Curiis*, and in diſturbing the Sheriff, in making an Arreſt upon one T. by force of a Bill of *Middleſex*: and being arraigned and found guilty, had Judgment of perpetual Impriſonment, and to pay one hundred pounds to the Queen. And note, that upon the evidence it appeared to be upon the ſtairs, aſcending the Court of Wards, and ſo out of the view of the Courts: But *Popham* ſaid, although it were out of the view of the Courts, yet if the Indictment had been as it ought to have been: *viz. coram Domina Regina*, the Judgment ſhould have been, that his right hand ſhould have been cut off, and that he ſhould forfeit all his Lands and Chattels, and have perpetual Impriſonment.

Cro. 1. part. *Cary's* Caſe 405.

Sr *William Waller* was indicted, for that he in the Palace of *Weſtminſter* neer the Great Hall, the Juſtices in the Kings Bench, Chancery, and Common Bench, judicially ſitting to hear Cauſes, made an aſſault, and affray upon Sr *Thomas Reignolds*, and beat him, in diſturbance of the Law, and contempt of the King,

Cro. 3. part. Sr. *William Wallers* Caſe *f.* 373 & 374.

King, &c. and upon this being arraigned, and found guilty, because the Indictment was not, that he did it in presence of the Justices, nor in the presence of the King, all the Judges agreed that the Judgment of cutting off his hand should not be given; and so *seriatim* they delivered their opinions: But because this offence was in the Palace, neer the Hall door, whereby tumults might have been made, and because it was found sitting all the Courts, and in disturbance of Justice and Law, and in contempt of the King, the Court awarded, that he should be imprisoned for the said offence during the Kings pleasure, and should pay 1000 pounds fine.

Thus much where the King is present by Representation.

If any strikes in the Kings Palace, where the Kings Royal Person resideth, he shall not lose his right hand, unless he draw blood; but if he draw blood, then his right hand shall be strucken off, he perpetually imprisoned, and fined, and ransomed. 33. H. 8. c. 12.

By what hath been said, a Man may perceive a great difference between a blow, or stroke in, or before the said Courts of Justice, where the King is representatively present, and the Kings Courts, where his Royal Person resideth; for in the Kings House, blood must be drawn, which needeth not in, or before the Courts of Justice, when the Judges are doing of that which to Justice appertaineth; and the reason is, *Quia Justitia firmatur Solium.*

7. Routs.

A Rout is when People do aſſemble themſelves together, and after do proceed or rid, or go forth, or do move by the inſtigation of one or more, who is their Leader: This is called a Rout, becauſe they do move and proceed in Routs and members.

Alſo where many aſſemble themſelves together upon their own common Quarrel, and brawles, as if the Inhabitants of a Town will gather themſelves together, to break hedges, pales, or ſuch like, to have Common there, or to beat another, that hath done to them a common diſpleaſure, or ſuch like, that is a Rout, and againſt the Law, although they have not done, or put in execution their miſchievous intent, if ſo be they do go, ride, or move forward after their firſt meeting.

Co. 3. Inſt. 176. *Lamb.* lib. 2. c. 5.

Note, that there is diverſity between committing of a great Rout, or the like, and Levying of War, for example, as if three or four, or more do riſe to burn or put down an Incloſure in Dale, which the Lord of the Mannour of Dale hath made there in that particular place, this or the like is a Rout, a Riot, or an unlawfull Aſſembly, and no Treaſon,

Co. 3 Inſt. f. 9 & 10.

But if they have riſen of purpoſe to alter Religion eſtabliſhed within the Realm, or Laws, or to go from Town to Town generally, and to caſt down Encloſures, this

is

is a Levying of War (though there be no great number of Conſpiratours) within the perview of the Statute of 25. E. 3. c. 2. becauſe the Pretence is publique and general, and not private in particular. As it was reſolved, *Paſch.* 39. *Eliz.* by all the Judges of *England*, in the caſe of *Richard Bradſhaw* Miller, *Robert Burton*, ——— Maſon, and others of *Oxfordſhire*.

8. *Riot.*

Riot (in Latine *Riotum*) cometh of the *French* word **Rioter**, *id eſt*, *Rixari*; and in the Common Law ſignifieth when three or more do an unlawful Act, as to beat any Man, or to hunt in his Park, chaſe or warren, or to enter or to take poſſeſſion of another Mans Land, or to cut or deſtroy his corn, graſſe or other profit, *&c.* Co. 3. Inſt. f. 176.

By the Statute of 17. *R.* 2. and 13. *H.* 4. the Juſtices of Peace, and Sheriff are to arreſt thoſe that commit Riot, and to record that which they find done in their preſence againſt the Law. 17. *R.* 2. c. 8. 13. *H.* 4. c. 7.

Each Man that is able, ought to help to repreſs Riots, upon pain of Impriſonment, and to make fine to the King. 2. *H.* 5. 8.

Evans, and *Cottington* and 7. others, were indicted for a Grand Riot, that they with others there named, to the number of 1000. perſons, made a Reſcous, and aſſault upon *Henry Smith* a Baylif, who by virtue of a Warrant upon a Bill of *Middleſex*, againſt

William Clerr, had arreſted him, and was carrying him to Priſon, and they procured him to eſcape. The Arreſt was at *Charing Croſs* in the Pariſh of St. *Martins*; and after the Arreſt, they aſſaulted the Bayliffes, and beat them; and the Bayliffes putting the Priſoner into an houſe for ſafe keeping againſt the tumult, they aſſaulted the houſe; and notwithſtanding a Juſtice of Peace, aſſiſted with three Conſtables, made proclamation for keeping the Peace, and for their departure, yet they continued their aſſault, breaking open the houſe, and with ladders taken from the Kings Houſe of *White-Hall*, (where the King with His Court was reſident) upon the 24. of *March* 13. Car. in the afternoon of the ſaid day, made this Riot and Reſcous, and carryed the Priſoner away through the Kings Houſe, and cauſed him to eſcape. Upon this Indictment 9. of them being arreſted, pleaded Not-guilty, and 4. of them *viz. Evans*, *Cottington*, *Groom* and *Heatly* being arraigned, were found guilty, and 5. of them were found Not-guilty, but againſt three of them was probable evidence, that they were aiding to this Riot and Reſcous, but the Jury acquitted them; wherefore becauſe it was ſo great a Riot, and offence, being committed ſo neer the Court, it was adjudged, that the ſaid four perſons, which were ſo convicted, ſhould be committed to Priſon, and every one of them ſhould pay 500. pounds fine to the King: And that every of them ſhould ſtand on the Pillory at *Weſtminſter*, and *Charing Croſs*

Croſs, where the Riot was done; and that *Thomas Groom*, who was a Cobler, and entered into the houſe with a drawn ſword, and a kettle upon his head, as an helmet to defend himſelf, ſhould ſtand on the Pillory with a ſword in his hand, and a kettle upon his head, and ſhould be bound with good ſecuties for their good behaviour, before they ſhould be delivered: And the three which were acquitted, againſt whom there was ſuch probable evidence, were bound to find ſecurities for their good behaviour.

Note, An unlawful Aſſembly is when three or more aſſemble themſelves together, to commit a Riot or Rout, and do it not. Co. 3. Inſt. f. 176.

One or more, ſayes the Lord *Coke*, may commit a force; three or more may commit an unlawful Aſſembly, a Riot, or a Rout: A multitude (as *Some* have ſaid) muſt be ten, or more. *Multitudinem decem faciunt*. And ſo (ſaid they) it is ſaid, *de grege hominum*. But *Coke* tells us, that he could never read it reſtrained by the Common Law to any certain number, but left to the diſcretion of the Judges. Co. Litt. 257. a. Co. 3. Inſt. f. 176.

In the Civil Law thus: *Decem homines populum, tres Collegium, duo Congregationem, & quindecim turbam conſtituunt in Jure Civili, ſed Jure in Communi Angliæ tres turbam faciunt.* Bartolus.

9. Affrais, Single Combats, and Challenges, &c.

1. Single combat. Single Combats, or Duels between any of the Kings Subjects of their own heads, and for private malice or displeasure, is prohibited by the Laws of this Realm; for in setled State governed by Law, no Man for any injury whatsoever ought to use private revenge; because it belongeth to the King, who is the Supream Magistrate, and Gods Lieutenant on Earth. And the Law herein is grounded upon the Law of God; *Deut.* 32. 35. *Rom.* 12. 19. It is also against the Law of nature, and Nations; for a Man to be Judge in his own proper Cause, especially in Duels, where fury, wrath, malice, and revenge are the rules of the Judgment.

Hinc est, sayes one, *quod Legum reperta est sacra reverentia, ut nihil manu, nihil proprio ageretur impulsu. Quid enim a bellica confusione pax tranquilla distat, si per vim litigia terminantur?*

Object. But it may be objected, that it is lawful *vim vi repellere*, therefore private revenge is lawful: The reason of the consequence is because by revenge force by force is repelled.

Resp. It is answered, That the antecedent is not simply and universally true: *Vim vi repellere licet cum moderamine inculpatæ tutelæ, in casu ultimæ, & indeclinabilis necessitatis, non semper & quocumque modo.*

Note, that Duels are lawful, if they are warranted

warranted by publick Authority, ſuch as heretofore our Tryals by batail, *ad probandam veritatem litis*; and ſuch was the Duell betwixt *David* & *Goliah*, which was ſtrucken by publick warrant and authority.

Vid. more of this in *Grotius lib.* 2. *c.* 1. *nu.* 15. & *cap.* 23. *nu.* 10.

Note further, that albeit upon the Single Combat (that proceeds not from publick authority) no death enſue, nor blood drawn, yet the very Combat for revenge is an Affray, and a great breach of the Kings Peace, an Affright and terrour to the Kings Subjects, and is to be puniſhed by fine aud Impriſonment, and to find ſureties for their behaviour. Affray.

When any Affray is made by Single Combat, any ſtander by, that is no Officer, may endeavour to part them, and prevent further danger, and the Law doth encourage them thereunto, for if they receive any harme by the Affrayours, they ſhall have their remedy by Law againſt them; and if the Affrayours receive any hurt by the endeavouring only to part them, the ſtanders by may juſtify the ſame, and the Affrayours have no remedy by Law. But if either of the Parties be ſlain or wounded, or ſo ſtriken as he falls down for dead, in that caſe the ſtanders by ought to apprehend the Party ſo ſlaving, *&c.* or to endeavour the ſame by the Hue and Cry, or elſe for his eſcape they ſhall be fined, and Impriſoned. ¶ But if the Sheriff, Juſtice of Peace, Conſtable, or other Conſervatour of the Peace Co. 3. Inſt. f. 178. 8. E. 2. Cor. 295. 22. Aſſ. Pl. 56.

do not part the Affrayers, for the preservation of the Kings Peace, and apprehend them being within his view, or do not his uttermost to part, and apprehend them, they may be imprisoned for their neglect thereof, for they may command others to assist them, and therefore the rule holdeth in them; *qui non prohibet, cum prohibere possit, in culpa est:* And if any be commanded to assist them therein, and refuse or neglect the same, it is a contempt in them, to be punished by fine and Imprisonment.

3. H. 7. 10. 6. *Bedingfields case.*

The words Affray and Assault be indifferently used of most Men, and that also in some of our Book Cases; but yet (according to *Lambards* opinion) there wanteth not a just difference between them: For Affray is derived of the *French* (Effrayer) which signifieth to terrify or bring fear, which the Law understandeth to be a common wrong, and therefore is it enquirable in the Turn of the Sheriff, or in a Leete 4. *H.* 6. 10, and 8. *E.* 4. 5. otherwise it is of an Assault, as it seemeth by those very Books; yet may an Affray be without word, or blow given; as if a Man shall shew himself furnished with armes, or weapon, which is not usually worn and born, it will strike a fear into others that be not armed as he is; But an Assault, as it is fetched from another fountain, namely from the Latine *Assultus*, which denoteth a leaping (or flying) upon a Man: so can it not be performed without the offer of some hurtful blow, or at the least of some fearful speech.

And

And therefore to ſtrike at a Man (although he were neither hurt or hit, with the blow) was adjudged an Aſſault 22. *Aſſ. Pl.* 60. For this Aſſault doth always neceſſarily imply a hitting; and therefore in Treſpaſs of Aſſault and Battery, a Man may be found guilty of the Aſſault, and yet be excuſed of the Battery. 40. E. 3. 40, & 45. E. 3. 24.

3. *Challenges.*

Co. 3. Inſt. f. 158. v. *Hobarts* Reports, *Barrow.* v. *Llewillen f.* 62. *Hickes* caſe 215.

If any Subject by word, Meſſage, or Writing challenge another to fight with him, this is an offence before any combat be performed, and puniſhable by Law, and it is *contra Pacem, Coronam, & Dignitatem Regis.* For, *prohibetur cum aliquid, prohibentur etiam media ad illud tendentia.*

The means of ſuch evills as well as the end are to be prevented.

10. *Libells.*

A Libel ſignifieth a criminous report of any Man caſt abroad, be he Magiſtrate, or a private Perſon, or otherwiſe, unlawfully publiſhed in writing, and therefore for diſtinction ſake it is called an Infamous Libel, or Paſquil.

It matters not whether the Libel be true or falſe, or whether the Party be of good fame or ill fame; for it inciteth all the ſame Family, Kindred, or Society to revenge, and ſo tendeth by conſequence to the effuſion of blood, and to the breach of the publick Peace, and therefore ſuch Libelling, be it true or falſe, is puniſhable by our Law.

It

It was resolved in the *Star-Chamber* in *Eliz. Hollywoods* Case, that if any find a Libel, and would preserve himself out of danger, if it be a private Man, the finder may either burn it, or presently deliver it to some Magistrate; but if it concern a Magistrate, or Publick Person, he ought to give it to the Magistrate.

Cro. 3. part. *Jeffs* case f. 275.

One *Jeffes* was indicted for that he exhibited an infamous Libel, directed unto the King, against Sr *Ed. Coke*, late Chief-Justice of the Kings Bench, and against the said Court, for a Judgment given in the said Court, in the Case of *Magdalen Colledge*, affirming the said Judgment to be Treason, and calling him therein Traitour, perjured Judge, and scandalizing all the Professours of the Common Law, and containing much other scandalous matter: and fixed this Libel upon the great Gate at the entrance of *Westminster* Hall, and in divers other publick Places: And being upon this arraigned, prayed that Councel might be assigned, which was granted, and he had them, but would not be ruled to plead as they advised; but put in a scandalous plea, and insisting upon it, affirmed that he would not plead otherwise, whereupon it was adjudged, He should be committed to the *Marshall*, and that he should stand upon the Pillory at *Westminster*, and *Cheapside* with a Paper mentioning the offence; and with such Paper be brought to all the Courts at *Westminster*, and be continued in Prison until he made his submission in every Court;

Court; and that he ſhould be bound with ſureties to be of good behaviour during his life, and ſhould pay a thouſand pounds fine.

Adam de Ravenſworth was indicted in the Kings Bench for the making a Libel in writing, in the *French* Tongue, againſt *Richard of Snowſhal*, calling him therein *Roy de Raveners*, *&c.* wheupon he being arraigned, pleaded thereunto Not-guilty, and was found guilty. *Mich.* 10. E. 3. Coram Rege Rot. 92, *Ebor.*

So by what has been ſaid, a Libeller or publiſher of a Libel, committeth a publick offence, and may be indicted therefore.

The words of the Civil Law touching Libellers are theſe:

Injuria committitur; ſi quis ad infamiam alicujus Libellum, aut Carmen, aut Hiſtoriam ſcripſerit, compoſuerit, ediderit, dolove malo fecerit, quo quid eorum fieret. Juſt. 4. 4. 1.

Si quis famoſum Libellum ſive domi, ſive in publico, vel quocumque loco ignarus repererit: aut corrumpat priuſquam alter inveniat, aut nulli confiteatur, inventum. Si vero non ſtatim eaſdem Chartulas, vel corruperit, vel igni conſumpſerit, ſed vim earum manifeſtaverit: ſciat ſe quaſi authorem hujuſmodi delicti capitali ſententiæ ſubjugandum. Cod. 9. 36. *De famoſis Libellis.*

11, and

11, and last, False Rumours, and slanderous news.

None shall report slanderous news whereby discord may arise between the King and his
3. El. c. 34. People, or Great Men of the Realm: And he that doth so shall be taken and kept in Prison, until he hath brought him into the Court, which was the first authors of the tale.

2. R. 2. c. 5. The penalty is the same for telling slanderous lies of the Great Men of the Realm.

12. R. 2. c. 12. But by the 12. R. 2. it is enacted, that when any such is taken and imprisoned, and cannot find him, by whom the Speech be moved, that he be punished by the advice of the Councel, notwithstanding the said Statutes.

Inter Leges Alvaredi c. 28. Note, the Law before the Conquest was, That the Author and Spreader of false Rumours amongst the People, had his tongue cut out, if he redeemed it not by the estimation of his head.

To conclude: It may easily and manifestly appear to all such as have been conversant in our Chronicles, how pernicious and dange- to this our Kingdom, unlawful Assemblies and false Rumours have been in all precedent Ages; yea, such as at the first were very small, and inconsiderable, and began upon very small occasions, yet not being repressed in time grew to such greatness and height, that they afterward put in hazard the State and Government of this Land: And therefore it is behoveful and good wisdom for all Magistrates,

giſtrates, and Juſtices of Peace to endavour by all good means to quench the beginnings and firſt ſparks of ſuch offences, as knowing that for want of timely reſtraint, they may ſoon grow to like danger again. And the axiome in our Law is:

Intereſt Reipublicæ, ut pax in Regno conſervetur, quæcumque paci adverſentur provide declinentur: i. e,

It it moſt neceſſary in a Common-wealth to provide, that tranquility and peace be continued in the Realm, and that all things being contrary thereunto, may by foreſight be eſchewed.

Thus much of the firſt Part of my *Treatiſe*, I proceed to the Second.

Judicium

Judicium Criminis, OR THE JUDGMENT OF ENGAND; Touching PLEAS OF THE CROWN.

CONCERNING Judgments Criminal, I ſhall preſent theſe particulars, worthy of the Candid Readers obſervation: 1. The Definition of puniſhment. 2. The end of puniſhment. 3. The Diviſion or ſeveral kinds of puniſhment found in our Authours. 4 The rules to be obſerved by our Judges for the inflicting of pains or puniſhments. 5. The circumſtances to be weighed in relation to puniſhments. 6. The perſons to be conſidered in Criminal Judgments. 7. The matters of Judgements Criminal. 8. The Judicial Acts, according to our Law.

Of theſe in their order.

1. *Of the Definition of puniſhment.*

Puniſhment in general ſignification is, *Malum paſſionis quod infligitur ob malum actionis*; but particularly it is defined by Mr *Horn Mirror c. 4. ſect.* 12. thus: Payne eſt a ſatisfaction de Trespaſſe, ou de peche:

2. *Of the end of punishment.*

The principal end of punishment in our Law is, that others by example may fear to offend, *Ut pœna unius sit metus multorum*; and therefore a Man that is *non compos mentis*, or an Infant that is within the age of discretion, is not (un Homme) within the statute of 25. E. 3. c. 2. *de proditionibus*; for the end of punishment is that others may be deterred from the perpetration of similar offences. But such punishment can be no example to mad Men, or Infants, that are not of the age of discretion.

Co. 3. Inst. f. 4. & 108. Co. Lib. 4. Beverleys Case 124. a b 3. H. 7. 1. b.

Touching the end of punishment, I shall offer the saying of *Quintilian* and *Seneca*.

Quintilian hath these words: *Omnis pœna non tam ad delictum pertinet, quam ad exemplum.*

Seneca thus: *In vindicandis injuriis hæc tria Lex sequuta est, quæ Princeps quoque sequi debet; ut aut eum quem punit emendet, aut ut pœna ejus cæteros meliores reddat, aut ut sublatis malis securiores cæteri vivant.*

De C. C. l. 1. c. 21.

3. *Of the Divisions or several modes of punishment.*

The kinds or modes of pain, whereby delinquents are asserted are these, saith *Bracton*: *Sunt quædam quæ adimunt vitam, vel membra: sunt quæ auferunt Civitatem, Burgum, vel Provinciam. Sunt quæ continent auxilium, perpe-*

Lib. 3. c. 6. Tract. 1. de Actionib.

perpetuum vel ad tempus, vel coercitionem ſſ. Impriſonamentum, vel ad tempus, vel ad perpetuum. Sunt quæ fuſtigationem, verberationem, pœnam Pilloralem, & Tymboralem, & damnum cum infamia inducunt: ſunt etiam quædam quæ dignitatis & ordinis inducunt depoſitionem vel alicujus actus privationem, vel prohibitionem.

The Diviſion of *Fleta* is thus:

Perſonalium injuriarum, quædam ſunt criminales, & quædam Civiles: Criminalium quædam ſententialiter mortem inducunt, quædam vero minime. *Lib. 1. c. 16.*

Horne thus: Of pains violent there be two ſorts, Corporal and Pecuniary: of Corporal ſome be Mortal, and ſome be Venial. *Mirror c. 4. ſect. 12.*

Having given the Reader the ſeveral puniſhments in our Law; it will not be amiſs to ſhew briefly the ſeveral ſorts of inflictions uſed amongſt the *Jews* and *Romans*.

1. Amongſt the *Jews*: Their puniſhments were either Capital, or not Capital: Their Capital contained four ſorts of Death. 1. Lapidation or Stoning. 2. Combuſtion or burning. 3. Decollation or Beheading. 4. Suffocation or Strangling. *Goodwins Civil. &c. Eccleſiaſt. Rites uſed by the Jews lib. 5. c. 7 & 8.*

The manner of burning was twofold; ſome they burnt with wood and fagots, this was termed by them, the Burning of the Body: Others they burnt by pouring in ſcalding hot lead, in at their mouthes, which deſcending into their bowels, killed them; the bulk of their Body remaining whole; and this was termed therefore, the burning of the Soul.

The leſſer puniſhments not Capital, were chiefly four: 1. Impriſonement: 2. Reſtitution: 3. *Talio* or Retaliation: 4. Scourging.

2. Amongſt the *Romans*:

Puniſhments publickly inflicted on Malefactors were either Pecuniary mulcts or Corporal puniſhments: The Pecuniary mulcts were two ſorts, either an appointed ſum of money was required of the party guilty, and then it was called *Mulcta*; or his whole State was ſeiſed on, and then it was termed a Confiſcation of his Goods.

Godwins Roman Antiq lib 3. ſect. 3. c. 1 & 2.

The Mulct was twofold, the one termed *Mulcta Suprema*, the other *Mulcta minima*.

Again; The Corporal puniſhments were either ſuch as were Capital, depriving a Man of his life: or Caſtigatory, ſuch correction as ſerving for the humbling and reforming of the Offender, or for the deſtroying of him.

Thoſe puuiſhments that deprived of life in ordinary uſe, and of which there is moſt frequent mention in *Roman* Authors, are theſe which follow; *Furca*, *Crux*, *Carcer*, *Culeus*, *Equuleus*, *de Rupe Tarpeia Dejectio*, *Scala Gemoniæ*, *Tunica*, *Damnatio in gladium*, *in Ludum*, *ad beſtias*.

Note, That Capital puniſhments were ſometime taken in a Civil acception for the loſs of freedom, which the *Romans* called *Capitis deminutionem*, diſfranchizing; becauſe in every Free-Man thus diſfranchiſed, or head of the Corporation was as it were cut off: and ſometime (as is ſaid before) it is

taken

taken for the loss of ones life; and this they called *Ultimum supplicium*.

Thus much of the kinds of punishments used amongst the *English*, *Jews* and *Romans*.

4. *Of the Rules for inflicting punishments.*

The Rules that concern the Infliction of punishments, are these following;

Respiciendum est Judicanti, ne quid aut durius, aut remissius constituatur, quam causa deposcit, nec enim aut severitatis, aut clementiæ gloria affectanda est: sed propenso Judicio, prout quæque res postulat, statuendum: In levioribus causis, leviores esse debent, ad lenitatem. In gravioribus autem pœnis, severitatem Legum cum aliquo temperamento benignitatis subsequi. Et pœnæ potius molliendæ sunt quam exasperandæ. Bract. lib. 3. c. 16. de Actionib.

2. *Pœna gravior ultra Legem posita, æstimationem conservat.* Or; Co. 3 Inst. f. 219.

Majore pœna affectus, quam Legibus statutum est, non est infamis.

With this Rule in our Law, the Civil Law Text doth concur;

Pœna gravior ultra Legem imposita existimationem conservat: ut & constitutum est, & responsum: ut puta si eum, qui parte bonorum multari debuit, Præses relegaverit: dicendum erit duriori sententia cum eo transactum de existimatione ejus, idcircoque non esse infamem. D. 3. 2. 13. 7.

3. *Carcer ad homines continendos, non ad puniendos haberi debet*: And therefore where the Law doth require that a Prisoner should Co. Lit. f. 260. a. Co 3. Inst. f. 35.

be kept *in salva & arcta custodia*, yet that must be without pain or torment to the Prisoner.

For *severas facit Justitia, non inhumanas facit.*

With our Law is agreable the Law Imperial.

D. 48 19. 8. 9. *Solent Præsides in carcere continendos damnare, aut ut in vinculis contineantur, sed ideas facere non oportet: nam hujusmodi pœnæ interdictæ sunt; carcer enim ad continendos homines, non ad puniendos haberi debet.*

4. *Nemo bis punitur pro eodem delicto.*

Co. *lib.* 4. *Hudson* & *Lees* Case *f.* 43. In an Appeal one H. counted that the Defendant, *&c. felonice* maimed him in his left hand, the Defendant pleaded, that before, *&c.* the Plaintif recovered in Trespass for the same Battery, and wounding 200 pounds and satisfaction acknowledged; resolved, that the Bar is good, for where the Plaintif is to recover damages only, (as in this Case of Appeal) he shal not be twice satisfied for the same thing.

Vide Co. lib. 8. Doctor *Bonhams* Case 118. *b. lib.* 11. *Fosters* Case.

Co. 2. Inst. 442. Co. Litt. 145. *b. Hobarts* Reports *Moore. v. Hussey f.* 94. 5. *Quis pro alieno facto non est puniendus*: no Man, if guiltless can be punished for anothers fault: And the reason is becaus the obligation to punishment hath his rise from defect, which being only personal, cannot extend to another, neither ought it to go in succession.

The Rules of the Civil Law do run with our Law.

Omnis

Omnis noxalis actio caput sequitur. Justit. 4. 8.

Et delicta & noxæ caput sequuntur. D. 16. 3. 1. 18.

Delictum injuria adfecti personam non egreditur.

6. *Pœnam in corpus patitur, qui in ære nihil habet.*

By the Statute of *Westminster* 1. *c.* 20. *de Malefactoribus in parcis*, it is enacted, that if any be attainted at the suit of the Party, he shall be fined, if he hath whereof, if not, he shall be imprisoned.

This rule holdeth good in the *Romans* Law. *Vide D.* 48. 19. 1. *D.* 2. 1. 7. 3. *D.* 47. 9. 9.

7. *In dubiis interpretationibus ad mitiora deflectendum est.* Co. 4. Inst. *f.* 66. *Hob.* Reports. *Courteens* Case.

And therefore general Acts of Parliament, which inflict punishment, *viz.* Sur ceo, que de Corps & de Avoir, &c. ought not to be expounded to extend to life or members, but to imprisonment.

This holds good also in the Imperial Law:

In pœnalibus causis benignius interpretandum est. D. 50. 17. 192. 1.

Interpretatione Legum pœnæ molliendæ sunt potius, quam asperandæ. D 48. 19. 42.

Judicandum est Legibus, non exemplis. Co 3. Inst. 212.

5. *Of the circumstances that ought to be weighed touching Pleas of the Crown.*

In all crimes or offences publick, that are brought before a Judge, are to be considered six circumstances.

Bracton lib. 3. c. 6. de generibus pœnarum. Fleta lib. 1. c. 16. de Actionibus criminalibus. Mirror c. 4. sect. 12.

1. *Causa, ut in verberibus, quæ impunita sunt a Magistro, vel a Parente, nisi modum excedant, quia emendationis non injuriæ gratia videntur adhiberi, & puniuntur, cum quis per iram ab extraneo pulsatus est.*

2. *Persona, nam magis delinquit, qui patrem, vel matrem, vel dominum interficit.*

3. *Locus, qui facit, ut idem sit furtum, vel sacrilegium, & secundum hoc minor pœna, vel major.*

4. *Tempus, hoc discernit prædonem a fure, & a Burglatore, furemque diurnum a nocturno.*

5. *Quantitas; hæc discernit furem ab Ambiguo, plus enim peccat qui gregem surripuerit, quam qui ovem.*

6. *Eventus; ut si ex voluntate & conscientia certa fecerit quis aliquid, sicut homicidium an ex eventu: Et secundum hoc, aut erit felonia, aut infortunium.*

Gothofredus on the Digest hath these words.

In factis, dictis, scriptis & Consiliis, Causa, Persona, Locus, Tempus, Qualitas, Quantitas, & Eventus consideranda sunt. Quintil. 6. Inst. *Atrocitas crescit ex his; quid factum sit, a quo, in quem, quo animo, quo loco, quo tempore, quo modo.*

6. *Of*

6. *Of the Persons to be coesidered in Criminal Judgments.*

The Persons that constitute Judgment criminal are §. Parties, Assistants, and Judge. 1. Of the Parties in Judgment

Of these in their order.

The Parties are, Accuser, and Accused, called sometime Appellor, and Appellee, sometime Indictor, and Indictee.

Britton telleth us, that it is not for every Person to accuse or appeal; for a Man outlawed, neither he that hath forjured the Realm, nor a Man attainted, nor an Approver that hath failed in his probation, nor an Infant within the age of 14 yeares, nor a mad Man, nor an Ideot, nor a mute, nor one that is deaf, nor a leper, nor a Man within Holy Orders, are not receivable in Appeals, *&c.* *Cap.* 22.

The *Mirror* saith, that Women, Infants, Ideots, Lepers, or Professours in Order of Religion, or Clerks, or Persons attainted of felony, or *non compos mentis*, cannot be Approvours. *c.* 1. *sect.* 3.

Now, an Approvour is he who hath committed some felony, which he confesseth, and appealeth or approveth, that is to say, accuseth others, which were coadjutours or helpers with him, in doing the same or other felonies, which thing he will approve; and this proof is to be either by Battaile or by the Countrey, at his election that appealed.

This Accusation is often done before the Coroner,

Coroner, who either is assigned to the felon by the Court to take and record that which he saith, or is called by the felon himself, and required for the good of the Prince and Common-wealth, to record that which he shall say.

If upon his appeal all those Partners be convicted, the King *ex merito Justitiæ* is to pardon him. But it is in the discretion of the Court either to suffer him to be an Approver, or after his approvement to respite Judgment and execution, until he hath convicted all his Partners.

21. H. 6. 29. b. & 34. b.

Note; If a Man that is of good fame be appealed by an approver, by which he is apprehended and kept in prison, yet he may have a writ, to be directed to the Sheriff, commanding him to suffer the Party appealed to be Bayled by good sureties. But if a Man appealed by an Approver, be kept in prison, and afterwards the Approver dieth, there he may sue a Writ directed to the Sheriff, to suffer him to be Bayled upon good surety, if he be not a notorious felon, although he be not of good fame, *Fitzh. N. B* 250. *d.*

Note further, that before Indictment no person can approve, because if his approvement be false, no Judgment (whatsoever he confessed) can be given against him, unless he be indicted, and no Judgment can be given against him, if his Appeal be false; but of the offence contained in the Indictment, and so are the Books to be understood.

43. Ass. Pl. 39. 15. E. 3. Cor. 113. 11. H. 7. 5.

Thus much of the Party accusing.

As

As for the party accuſed or appealed, he is alwayes arraigned either as principal, or acceſſary.

Of theſe diſtinctly and apart.

1. *Of Principals.*

It is a ſure rule, that *in alta proditione, nullus poteſt eſſe acceſſorius, ſed Principalis ſolummodo.* Co. 3. Inſt. 138.

As if many men conſpire to Levy War, and ſome of them do Levy the ſame, according to the conſpiracy, this is High treaſon in all, for in Treaſon all be principalls. Co. 3. Inſt. f. 9.

If a man committeth Treaſon, and thereby becometh a Traitor, if any other man knowing him to be a Traitor, doth receive, comfort and aid him, he is guilty of Treaſon, as principal, for that there be no acceſſaries in High Treaſon. 19. H. 6. 47. 3. H. 7. 10. Co. 3. Inſt. f. 138.

Note, that in the loweſt offences there are no acceſſaries, but all are principals, as in Riots, Routs, *&c.* Co. Litt. 57. *b.* Co. 3. Inſt. 20 & 21.

There is another rule; *Nullus dicitur felo principalis, niſi actor, aut qui præſens, aut auxilians actorem ad feloniam faciendam.* 57. Inſt. 20 & 21. Co. 3. Juſt. 138.

But this rule hath his exceptions; for in caſe of poyſoning, if one layeth poyſon for one, or infuſeth it into a broth, or the like, albeit he be not preſent, when the ſame is taken, and either the party intended, or another is poyſoned, yet he is a principal: and in that caſe, both the principal and procurer or acceſſory may be abſent. Co. *lib.* 4. *Vaux's* Caſe. *Plowd.* Com. 474. *Saunders's* Caſe. Co. *lib.* 9. *Gores* caſe.

So

Co. 2. Inſt. 238. Co. 3. Inſt. f. 63.

So there is a felony wherein all be principals, as well before as after, though they be abſent at the doing of the felony, but this is ſpecially provided by the Statute of 3. *H.* 7. *c.* 2. of Taking Women againſt their wills.

Co. 3 Inſt. f. 59. 3 & 4. P. & M. Juſtice *Daliſons* Reports.

Note, If any be preſent, abetting, and aiding any to do an Act, though the offence be perſonal, and to be done by one only, as to commit a Rape, not only he that doth the Act is a Principal, but alſo they that be preſent, abetting and aiding the miſdoer, are principalls alſo.

2. *Of Acceſſary.*

In caſe of felony, as there be principals, ſo there be Acceſſories, and acceſſories be of two ſorts, by the Common Law, and by the Statute Law.

Acceſſory by the Common Law is alſo of two ſorts §.

1. Acceſſory before the offence or fact; and it is he that commandeth or procureth an other to commit felony, and is not there preſent himſelf, when the other doth it, but if he be preſent, then he is alſo a principal: As where I S. doth hold I. X. and commands I. D. to kill him, whereupon I. D. doth give him a wound to his heart, whereof he inſtantly dies, It is held that both be principals, becauſe both are parties to the wound. 13. *H.* 7. 10. *a.*

So a Woman ſervant conſpired to rob her Miſtreſs, and brought a Stranger to the Bed-

ſide,

ſide, where the Miſtreſs lay aſleep, the Stranger killed, the ſervant ſilent, nothing doing, but holding the candle; the two Chief Juſtices and Hare, thought the Servant a Traitreſs and a principal. 2 & 3 Eliz. Dyer f. 128.

If a Man counſelleth a Woman to murther the Child being in her Body, and after the Child is born, and then is mudered by the Woman in the abſence of him that ſo gave the Counſel; yet he is acceſſary before the fact, by his counſelling, before the birth of the Infant, and not countermanding it. Dyer f. 186.

Note, that in Man-ſlaughter a Man cannot be acceſſary before the fact, for Man-ſlaughter enſueth upon a ſudden debate or Affray, for if it be premeditated, it is murder. Co. lib. 4. f. 44. a.

2. Acceſſory after the offence, and it is he, that receiveth, favoureth, aideth, or comforteteth any Man, that hath done any murder or other felony, whereof he hath knowledge, ſuch an acceſſory ſhall be puniſhed, and ſhall have Judgmenn of life and member, as well as the principal, which did the felony.

But the Quere may be, whether one may be acceſſory to an acceſſory? It is anſwered, that one may; if one felonioufly receive another, that is acceſſory to felony, there the receiver is an acceſſory.

Thus much of acceſſories by the Common Law.

Acceſſory by the Ssatute Law, is ſuch a one that abbeteth, counſelleth, or receiveth any Man, which committeth, or hath committed any offence made felony by Statute; for although

though the Statute doth not make mention of acceſſories; abettours, &c. yet they are included by the interpretation of the ſaid Statutes: Becauſe whenſoever an offence is made felony by act of Parliament, there ſhall be acceſſories before and after, as if it had been made a felony by the Common Law.

Co. 3. Inſt. f. 59 & 72. 7. E. 6. Dyer 88.

For the further underſtanding of acceſſories, it will not be unneceſſary to give the Reader ſome certain Rules touching them; and then ſome Queries.

Reg. 1. *Acceſſorius ſequitur naturam ſui principalis:* As if the Wife procure one to murder her Husband, and doth it accordingly, in this caſe the Wife being abſent, is but acceſſory, and ſhall be hanged and not burnt, becauſe the acceſſory cannot be guilty of Petit treaſon, where the principal is not guilty but of murder: and *acceſſorium naturam ſequi congruit principalis*, The acceſſory muſt follow the natute of the principal.

Dyer 16. Eliz. 332. a. Saunders caſe. Co. 3. Inſt. f. 20 & 139.

Reg. 2. 2. *Ubi factum nullum, ibi fortia nulla: Et ubi non eſt principalis, non poteſt eſſe acceſſorius.*

As if the principal and acceſſory be arraigned, and both found guilty, and the principal has his book before Judgment: It was adjudged, the acceſſory ſhall be diſcharged; and alſo if the principal confeſs, and hath his book, the acceſſory ſhall be diſcharged, becauſe Judgment was new given againſt the principall.

Co. 3. Inſt. 114. 2. H. 7. 1. 6. 12. 6. Co. lib. 4. Syers caſe.

So where the principal before attainder is pardoned, the acceſſory is diſcharged.

It is

It is resolved, that where the principal was found guilty of Man-slaughter, and not guilty of murder, and had his Clergy, the accessory shall be discharged, for till Judgment, it doth not appear judicially that there was a principal: But if the principal prayes his Clergy, after he hath had Judgment, or if he be pardoned, yet the accessory shall be arraigned, for it appears judicially that there was a principal. Co. *lib.* 4. *Syers* case. Cro. 1. part. *Goff*, v. *Byby f.* 541. Co. *lib.* 4. *Bibithes* Case.

By what has been said, you see that the accessory ought not to be condemned, but where the principal is attainted, and not where he is convicted only, and had his Clergy; which Clergy is a Refuge provided by the Common Law in favour of Learning, to save the life of an offender *Literate* in certain cases; I say in certain cases, because the benefit of the Clergy is taken away in many particulars, as, Of Clergy.

1. For stealing of horses 1. *E.* 6. *c.* 33.

2. For robbing dwelling houses, *&c.* in or neer the high way. 5. *E.* 6. *c.* 9.

3. For burning of houses, or Barns 5. *Ph. & M. c.* 4.

For stealing of 5. Shillings in any dwelling house, or any place adjoyning, 39. *Eliz. chap.* 15.

5. For Burglary and Rape, 18. *Eliz. c.* 17.

6. For stealing 12 pence or more, without the knowledg of the Person, *&c.* 8. *Eliz. c.* 4.

7. For killing one that hath no weapon drawn. 1. *Jac. c.* 9. *&c.* Co. 3. Inst. *f.* 39.

But

But to conclude this learning of Clergy; It is a Rule whensoever felony is made by any Statute, and the benefit of Clergy is not taken away, the offender shall have his Clergy.

Reg. 3. The accessory ought not to be put to answer, before the principal be attainted; for

9. H. 7. 19. b. Co. 3. Inst. f. 231. *Juri non est consonum, quod aliquis accessorius in Curia Regis convincatur, antequam aliquis de facto fuerit attinctus*: And consequentially by the Reversal and acquittal of the principal, the dependant Judgment against the accessory cannot stand.

And this is agreable to the Rules of the Imperial Laws;

D. 50. 17. 178. *Cum principalis causa non consistat, plerumq; ne ea quidem, quæ sequuntur locum habent.*

Alciolus. *Quando res aliqua sit accessoria principali, vitiato principali, corruit accessorium.*

Thus much of the Rules, and now for the Quæries with Solutions.

Qu. 1. A Man being made accessorie to two, whether he can be found accessory to one?

Resp. If an Appeal be brought against two, as principalls, and against another as accessory to them, in this case both of them must be

Co. 2. Inst. f. 183. attainted, before the accessory be outlawed, and if one of the principals be found not guilty, the accessory is discharged, for the Plaintiff made him accessory to two, and therefore he cannot be found accessory to one.

Whether

Qu. 2. *Whether the Writing of Letters &c. in Favour of a Felon can make him an Acceſſory?*

Reſp. If a man write Letters for a Felons deliverance, or in favour of him, or the like, he is no Acceſſory, for that he received not the Felon. 26 *Aſs. pl.* 47,

Qu 2. *Whether the Inſtructing of a Felon to Read will make the Perſon Inſtructing an Acceſſory?*

Reſ. A Vicar Inſtructing an Approver which could not Read, whilſt he was in priſon, to Read, whereby he eſcaped, was adjudged not Acceſſory to the Felony. Co. 3. Inſt. *f.* 139,

Qu. 3. *Whether the perſwading Witneſſes not to Appear to give Evidence againſt a Felon will make one an Acceſſory to the Felony?*

Reſ. *Catlin* and *Brown* Juſtices of Aſſize in the County of *Suffolk* put this Caſe to all the Judges: A man committed Felony in the County of *Suffolk*, for the which he was committed to the Goal, and *R.* an Attorney adviſed the Friends of the Felon to perſwade the Witneſſes not to Appear to give Evidence againſt him, which was done accordingly; And it was Reſolved, that neither the Friends, nor the Attorney were Acceſſories to the Felony, but it was a great Contempt and Miſpriſion, for which they might be fined and impriſoned. *Mich:* 11 & 12 Eliz: *the Caſe of* Roberts *the Attorney,*

Hitherto of the Parties in Judgements Criminal.

2 Of the Assistants, The Assistants in *Judgements Criminal* are of two sorts, the one appertaining to the King, as the Kings Serjeants, his Attorney, and Solicitor General, and the Clerk of the Crown; the other to the party Arraigned assigned to him (upon his prayer) by the Court.

The Duty of the Kings Councel learned in the Laws is to manage the Evidence against the prisoner at his Tryal, and the Function of the Clerk of the Crown is to frame, read, and record all Indictments against Traytors, Felons, and other Offenders Arraigned in the Kings Bench upon any publique Crime.

2 H:4. c:10, Note by the Statute of 2 *H:* 4. this Clerk of the Crown, if fourscore or a hundred men be Indicted of Felony, or Trespass, of one Felony, or one Trespass, and they plead to an Issue, as not Guilty, the said Clerk ought not to take for the *Venire Facias*, nor for the Entring of the Plea but two shillings only, and not two shillings for every one, which Act is made in affirmance of the Common Law. So if one man be Indicted of two several Felonies, or Trespasses, and is acquit-
26 Ass: pl: 24. ted, he shall pay but for one Deliverance.

As to the Councel belonging to the Party Arraigned, the Law of *England* is thus; Where any person is Indicted of Treason or Felony, and pleadeth to the Treason or Felony, *Not Guilty*, which goeth to the Fact best known to the party; it is holden that the party in that Case shall not have an Advocate assigned

assigned to defend his Cause, or alledge any matter for him; but if the party Arraigned hath any matter of Law to plead, he shall have Councel assigned by the Court, to plead the same, as to plead a general Pardon, or a particular Pardon, or to plead in Arrest of Judgement, if the Verdict be found against him, that the Tryal came not out of the right place, as it fell out in *Arundels* Case convicted by a Jury of wilful Murder, or any other matter of Law. Co. lib. 6. f. 14, Arundels case.

Sir *Humphrey Stafford* had an Advocate assigned him concerning the priviledge of Sanctuary, from whence he was drawn by force; but for the matter of High Treason he pleaded his own Cause. 1. H. 7. 7 22, b.

But though the party Arraigned upon an Indictment of Treason, or Felony, and pleading to the Treason or Felony, *Not Guilty*, which goeth to the Fact, cannot have Councel to give in Evidence, or alledg any matter for him; yet in Appeals which are the Suites of the Subject, Councel is allowed; and the Reason why Councel is not prohibited in an Appeal as it is in an Indictment may be this: There is no Appeal brought, but that of common presumption the Appellant hath malice against the Apellee; and therefore if the Judges should in those Cases shew themselves to Instruct the Appellees, the Appellants would grutch, and think them partial, and therefore as well of the Indempnity of the Court, as of the Appellee in that Case that he be not guilty, the Law suffereth the Appellee Doctor & Stud. lib. 2. c. 48.

pellee to have Councel; but when a man is Indicted at the Kings Suit, the King intendeth nothing but Juſtice with Favour, and that is to the reſt and quietneſs of his faithful Subjects, and to pull away Miſdoers among them charitably, and therefore the King will be contented that his Juſtices ſhall help forth the Offenders, according to the Truth, as far as Reaſon and Juſtice may ſuffer.

Co 3. Inſt. 29. Note, that in *Scotland*, in all Criminal Caſes, yea in caſes of High Treaſon *Pars rea* may have Councel learned. Thus much of the *Aſſiſtants*.

2 Of the Judge. There is in Criminal or Publique Judgement a two-fold Judg, one of matter of Fact, and that is the Iury, whoſe Office is to find out the truth of the Fact; the other of Law-matters, and that is the Kings Juſtice, whoſe Office is to find out the truth of the Law, *Ad quæſtionem facti non reſpondent Iudices, ita ad quæſtionem Iuris non reſpondent Iuratores.* Of theſe particularly.

Co Lit. 226. a. lib. 4 Haydons caſe, 42 a. lib. 9. Dowmans caſe f. 13, a.

1. *Of the Iury.*

Iurors ought to be perſons competent, and that they be ſuch, it is required that every Juror that is returned for the Tryal of the life of man, ought to have three qualities.

Co. Lit. 155, b, 272, a, 78, b, 1. He ought to be Dwelling moſt near to the place where the queſtion is moved, for *Lex intendit vicinum vicini facta ſcire.*

Stat. 2. H. 5 c. 3. Stat. 2, 2. He that paſſeth in an Enqueſt of Life, and death, ought to have Lands and Tenements,

ments, to the value of 40 Shillings.

3. He ought to be leaſt ſuſpicious, that is to be indifferent, as he ſtands unſworn; and then he is accounted *Liber & legalis homo*, otherwiſe he may be challenged, and not ſufferred to be ſworn.

The Determination of the matter of fact by Jurors, is termed in our Law, a Verdict, in Latin *Veredictum*, *quaſi dictum veri ſatis*. Co. Lit. 226. *a.* Co. *lib.* 9. *f.* 13. *a.*

And of Verdicts ſome are general, ſome ſpecial, or at large: It is called a Special Verdict or at Large, becauſe the Jurours find the ſpecial matter atlarge, & leave the Judgment of Law, thereupon to the Court: Of which kind of Verdict it is ſaid, *Omnis concluſio boni & veri Judicii ſequitur ex bonis & veris præmiſſis, & dictis Juratorum.* Touching ſpecial Verdicts in Crown matters, *Vide Cro.* 3. *part. Hallowayes caſe*; *Cookes caſe f.* 537. *Dowmans* Caſe. Co. Lit. *f.* 226. *b.*

2. *Of the Judge in matters of Law.*

The Judges (that are to decide, and diſcuſſe matters in Law) are bound to obſerve theſe particulars §.

1. They ought to judge *ſecundum allegata & probata: Quotieſcunque ſententiam fert Judex, ſecundum allegata, & probata ferre debet.*

2. They ought to ſee, that the Indictment, Tryal, and other proceeding be good, and ſufficient in Law, otherwiſe they will by their erronious Judgment attaint the Priſoner unjuſtly. Co. 3. Inſt. *f.* 137.

3. The Court ought to be, inſtead of Counſel for the Priſoner, to ſee that nothing be

Co. 3. Inſt. f. 29. urged againſt him contrary to Law and right; nay, any Learned Man that is preſent, may informe the Court, for the benefit of the Priſoner, of any thing that may make the proceedings erronious.

4. The Judges ought not to deliver their opinions before hand of any Criminal cauſe, that may come before them judicially, to the end that the Tryal may be more indifferent, ſeeing the ſafety of the Priſoner conſiſteth in the indifferency of the Court: And how can they be indifferent, who have delivered their opinions before hand without hearing of the party, when a ſmal addition or ſubſtraction may alter the Caſe?

Co. 3. Inſt. 29.

5. Judges ought in giving Sentence, eſpecially in ambiguous Caſes, to avoid precipitation, becauſe *ad pœnitentiam properat cito qui judicat. Feſtinatio Juſtitiæ noverca.*

Co. Lib. 9. *Dowmans* Caſe 13. *a.*

Touching Temerity or Haſtineſs, take theſe foreign Authors:

Temeritas eſt, damnare quod neſcias, ſayes *Seneca.*

Temeritate omnis actio vacare debet; Cicero 1. Offic. *Nihil temeritate turpius*; Id. de Natura. *Nihil a gravitate Sapientis temeritate diſiunctius.* 4. Academ.

Deliberabo, Lex vult nihil temere fieri: ſayes *Seneca* lib. 2. Controv. 11.

Hitherto of the Perſons that are converſant in Judgment touching publick Crimes, or offences.

7. Of

7. *Of the Matters of Judgments Criminal; and how they are brought to a judicial Deciſion.*

The things or matters of publick or criminal Judgments are Cauſes proceeding from High treaſon, Felony, or other Miſdemeanours.

Touching High treaſon and Felony, two things are to be obſerved.

1. In antient time, every Treaſon was comprehended under the name of Felony (but not *e contra*;) and therefore in our antient Books, by the Pardon of all felonies, High treaſon, or Counterfeiting the Great Seal, and of the Kings Coyn, *&c.* was pardoned. But the Law now is, and of long time hath been otherwiſe holden: And therefore by the Law at this day under the word Felony, in all commiſſions, *&c.* are included Petit treaſon, Murder, Homicide, Burning of Houſes, Burglary, Robbery, Rape, *&c.* Chance-medley, *Se defendendo*, and Petit Larceny; but not High treaſon, for it is not comprehended under the word Felony; and therefore ought to be eſpecially named, in the Kings Pardon or Charter.

2. E. 4. 14. 18. E. 4. 10 23. Aſſ. Pl. 19.

Co. Litt. 391. *a.*

2. That criminal, or publick Cauſes are called Pleas of the Crown, but they are not ſo called, as ſome have ſaid, becauſe the King *Jure Coronæ*, ſhall have the Suite and Common Pleas, becauſe they be held by

Co. 2. Inſt. f. 22.

Common Persons, for a Plea of the Crown may be holden betwixt Common Persons, as in Appeal of Murder, Robbery, Rape, Mayhem, &c. and the King may be party to a Common Plea, as a *Quare impedit*, and the like,

But now, how these criminal matters are brought to a judicial hearing, is the question; It is answered, that they are brought by way of Accusation, and Exception.

1. *Of Accusations.* Accusation doth proceed either by way of Appeal, or by way of Indictment; and first of Appeals.

Appeal. Appeal, *Appellum*, cometh of the French word Appeller that signifieth to accuse, or to appeal, or appeach. An Appeal is therefore an Accusation of one upon another, with a purpose to attaint him of Felony, by words ordained for it.

Co. Litt. 123. b. 126. b.

Now Appeals are of three sorts:

Co. Litt. 287. b. 1. Of wrong to his Successor, whose heir he is, and that is only of Death, which is of two sorts, of Murder, & of Manslaughter; but of Chancemedley, no Appeal doth lye.

As touching Appeal of Murder this Quære is put.

Qu. *Whether Tryal of Murder by Appeal ought to be brought in the County, where the fact was committed?*

Resp. It is adjudged, that in an Appeal of Murder, the writ shall abate if it be not brought in the County, where the fact was committed; for it is against a fundamental Rule of Law, that a Tryal of murder by Appeal,

Appeal, or otherwiſe, ſhall be out of the County where it is perpetrated: And for this cauſe, it was doubted at the Common Law, where a ſtroak were given in one County, and death enſued in another, how it ſhould be tryed? And to avoid this doubt the Stat. of 2. *E.* 6. was made. Cro. 3. part. *Sontley, v. Price* 247.

But it alwaies was clear, that a fact in one County ought not to be tryed in another.

Note, the Stat. of 26. *H.* 8. *c.* 6. allows that Indictments may be in County's next adjoyning; but there is not any mention of Appeals; and for this reaſon Certioraries have been granted, to remove Indictments out of the Grand Seſſions in Wales.

2. Of wrong to the Husband, and is by the Wife only of the death of her Husband to be proſecuted: Touching this kind of Appeal I propoſe theſe Queries, with Reſolutions on them. Co. Litt. 33. *b.*

Qu. 1. *Whether a Wife* de facto, *ſhall have an Appeal?*

Reſp. Some do hold, and ſo do I, that a Wife *de facto*, ſhall have an Appeal of the death of her Husband, but only ſhe that is Wife *de jure in favorem vitæ*; and that there ne unques accouple en loyal Matrimony, ſhall be taken *de jure* ſtrictly.

Qu. 2. *Whether the Wife can have an Appeal, although ſhe cannot have a Writ of Dower?*

Reſp. The Wife ſhall have an Appeal, where ſhe cannot have a Writ of Dower, as if ſhe Elope, *&c.* ſhe is barred of her Dower, but Co. Litt. 33. *b.*

not

West. 2. c. 34. Co. Litt. 33. b. 37. a. Co. 3. Inſt. f. 215

not of her Appeal; and the reaſon is, for that the Stat. barreth her of her Dower, but not of her Appeal.

So if the Husband be attainted of Treaſon, or Petit treaſon, his Wife ſhall not be endowed; and yet if any do kill him, the Wife ſhall have an Appeal; for notwithſtanding the Attainder he remained her Husband.

35. H. 6. 63.

Qu. 3. *Whether ſhe ought to be ſole and unmarried, that brings an Appeal of her Huſbands Death?*

Reſp. It is requiſite, that ſhe be ſole and unmarried, that makes this Appeal; for if ſhe marry again, her Appeal is gone, though the new married Husband be dead within the year and day, after his death that was ſlain.

e1 The Woins Law. b. 5. ſt. 1.

Qu. 4. *Whether the taking of a ſecond Huſband after Judgment, and before Execution, can hinder the Execution of the Judgment?*

Reſp. Not only a Widdow, which hath an Appeal hanging, abateth her Appeal, and loſeth it force, by new Marriage; but alſo if after Judgment and before Execution, ſhe take an Husband, ſhe loſeth the Execution of the Judgment.

ſma H. 4. 41

Qu. 5. *What is the true reaſon, why a Woman hath an Appeal* de morte Viri?

Reſp. The reaſon wherefore this Action is given to a Widdow, is not as *Glanvil* makes it, *Quia una caro eſt vir & uxor*; for then the Baron might have an Appeal *de morte uxoris*, which is never granted, but her heir ſhall have it: But the true reaſon why a Woman hath the Appeal *de morte Viri*, is becauſe by his death

The Woman Lawyer lib.

death ſhe is thought leſs able to live and maintain her ſelf, & that therefore when ſhe taketh another Husband, *ceſſante cauſa, ceſſat effectus*; and her Appeal is gone, as la Widowes Quarentine is determined, when ſhe is once remarried.

3. Of wrong done to the Appellants themſelves, as Robbery, Rape, and Maihem. 1. *Robbery.*

If in an Appeal of Robbery, the Plaintiff omit any of the goods ſtoln, they are forfeit to the King, for the favour, which the Law perſumeth the Plaintiff beareth to the Felon: and for that he cannot have reſtitution for more then is in his Appeal. Co. 3. Inſt. f. 227.

If the Jury find in an Appeal of Robbery for goods, that the Defendant found them in the High-way, in this caſe the Plaintiff for his falſe Appeal, ſeeking the blood of the Innocent, ſhall forfeit his goods to the King. 2. E. 3. Cor. 367, & 368.

If any Virgin, Widdow or ſingle Woman be raviſhed, ſhe her ſelf may ſue an Appeal of Rape, proſecute the Felon to death, and the Kings Pardon cannot aid him. 2. *Rape.*

But if a Feme Covert be raviſhed, ſhe cannot have an Appeal without her Husband, as appears 8. *H.* 4. 21. If a Feme Covert be raviſhed, and conſent to the Raviſher, the Husband alone may have the Appeal, and this by the Stat. of 6. *R.* 2. *c.* 6. And the Husband that this Statute ſpeaketh of, which may ſue the Appeal, muſt be a lawful Huſband, in Right and poſſeſſion; for ne unques accouple en loyal Matrimony, is a good Plea againſt him. 11. H. 4. 19.

An

3. *Maihem.* An Appeal of Maihem was brought by one *Miller*, and the Maihem was aſſigned in his ſhoulder; and the Defendant demanded the view, and it was ſaid, that he ſhould not have it, becauſe it was done de ſon tort demeſne: alſo it was ſaid, that Surgeons may heal and cure him, and although he ſhall be tryed by Inſpection of the Court, or by Chirurgeons, it was held be it one way or other, it is peremptory for him, *&c.*

21. *H.* 7. 23. *b.*

It was held by all the Juſtices of the Kings Bench, that in an Appeal of Maihem, if the Defendant pray that the Maihem may be examined; if the Juſtices or Surveyors which they require, be in doubt whether it be a Maihem or not, the Judges may refuſe the examination, and compel the Party to put it upon the Country.

21. *H.* 7. 40. *a.*

Thus much of wrong done to the Appellants themſelves.

I ſhall conclude this Learning touching Appeals with theſe Queries.

Qu. 1. *Whether all Appeals ought to be ſued in proper Perſon?*

Reſp. It is anſwered, that all Appeals are to be ſued in proper Perſon, and not by Attorney, as Appeal of Maihem muſt be in proper Perſon. A Woman, which was Groſſeſſement enſeint, ſued this Appeal; and the Defendant was attainted, the Womans Appearance was recorded for the whole Terme; and yet by the better opinion, ſhe might not pray Execution by her Councel, but ought to come in proper perſon: therefore one of the Judges did

21. *E.* 4. 72, & 73.

The Womans Lawyer lib. 5. *ſect.* 2.

did ride to *Iſlington* to her, to ſee if ſhe were alive, and deſired Execution, which ſhe required, and the Defendant had Judgment.

Qu. 2. *Whether an Appeal may be commenced more then one way?*

Reſp. It is anſwered, that Appeals are commenced two wayes, either by Writ, or by Bill.

1. By Writ, when a Writ is purchaſed out of the *Chancery* by one Man, againſt another, commanding him that he ſhall appeal a third Man of ſome felony, or other offence by him committed, and to find Pledges, that he ſhall do this with effect, and this Writ is to be delivered to the Sheriff to be recorded.

2. By Bill, when a Man of himſelf giveth his Accuſation of another Man in Writing to the Sheriff, or Coroner, and taketh upon himſelf the burthen of appealing him that is named in the ſaid Writing.

And note, that there is a diverſity worthy of obſervation, betwixt an Appeal by Bill, and by Writ: for in the Appeal by Original Writ both principals and acceſſories, are generally charged alike, without any diſtinction, who be principals, and who be acceſſories: but otherwiſe in the Appeal by Bill. Co. 2. Inſt. f. 183.

Thus much of the Accuſation by way of Appeal. I proceed now to ſpeak of the other kind of Accuſation; *viz.* by Indictment.

Indictment cometh of the *French* word Enditer, and ſignifieth in Law an Accuſation found by an Enqueſt of 12 Men, or more upon *Indictment* Co. Litt. f. 126. b.

upon their Oaths, and the Accuſation, in Latin is called *Indictamentum.* And as the Appeal is ever the Suite of the Party, ſo the Indictment is alwayes the Suite of the King, and as it were his Declaration.

For the clearer underſtanding of Indictments, take theſe following Rules.

Reg. 1. That there be words ſo appropriated to offences criminal, that they cannot be Legally by any other words, or Periphraſis.

Rape. The word *Rapuit*, in an Indictment of Rape, muſt be uſed, for *carnaliter cognovit eam*, or the like will not ſerve.

Co. Lit. 124. *a. Co.* 2. *Inſt.* 180. *Cro.* 2. *part.* Fitzwilliams *Caſe.*

Murder. An Indictment, *Quod felonice, & ex malitia ſua præcogitata occidit*, ſuch a one without ſaying, *Murdravit*, is no Indictment for Murther, although theſe words *Tantamount. Cro.* 3. *part.* Fitzwilliams *Caſe Co. l.* 4. Brookes *Caſe* 39. *b.* 8. E. 6. Dyer 69. *a.* 304. *b.*

High treaſon. No Indictment can be of High treaſon, without this word (*proditorie*) *Co.* 3. *Inſt. f.* 15, & 4.

Mayhem. In an Indictment of Maihem (*Maihemavit*) cannot be expreſſed by any word, as *mutilavit, truncavit*, or the like, *Co. Litt.* 126. *b.*

Felony. The word *Felonice*, muſt be uſed in all Indictments of Felony, and cannot be expreſſed by any other word. *Co. Litt.* 391. *a.*

Reg. 2. Falſe Latine ſhall not quaſh an Indictment, if the word be ſenſible. *Co. leb.* 5. Lowes *Caſe.*

It is moved in Arreſt of Judgment, that an

an Indictment was not good, being *fecerunt*, whereas it was found only *Billa vera* againſt one; *ſed non allocatur*: Becauſe it was exhibited againſt two, and it is but falſe Latine. Cro. 3. part. *Cholmo leges* Caſe.

Miſrecital of a Statute, being fatal in Indictments, the ſure way is to draw the Indictment with concluſion *contra formam Statuti*, and with no Recital of the Act. *Co. l.* 4. 48. *a.* Reg. 3.

Every Indictment ought to have the Addition of the Party indicted, and his place of Abode. *Cro.* 2. *part.* Reads *Caſe, and* Johnſons *Caſe*, 610. Reg. 4.

In all Caſes of death, the word *percuſſit*, ought to be uſed, except in caſe of poyſoning. *Co. lib.* 5. Longs *Caſe.* Reg. 5.

Where a Man indicted, is not convicted, or acquitted, he may be arraigned upon a new Indictment. *Cro.* 3. *part.*: Withipools *Caſe.* Reg. 6.

Where the ſubſtance of the Indictment, no matter for circumſtances: As if *A.* be indicted of murder, *viz.* that he of malice prepenſed killed *JS*: *A.* pleadeth, that he is not guilty *modo & forma*; yet the Jury may find him guilty of Man-ſlaughter, without malice prepenſed, becauſe the killing of *IS.* is the matter, and malice prepenſed is but a circumſtance. Reg. 7. Co. Litt. *f.* 282. *a.* lib. 9. *Mac-kaleyes* Caſe.

From Accuſation (both by way of Appeal and Indictment) which is as it were the Declaration. I proceed to the Pleas of the Parties accuſed, which are denominated exceptions.

Now,

Now, the Pleas or Exceptions in Indictments or Appeals, are these §.

Auterfoitz attaint d'un auter offence, Auterfoitz Acquit, Auterfoitz convict de meſme le Felony devant Judgement, Auterfoitz convict d'un auter Felony, & auterfoitz attaint de meſme le offence.

Of theſe briefly in order.

1. Auterfoitz attaint d'un auter Offence.

It is a ſore ſaying, which ſome Men have to plead for themſelves, *viz.* That they are already condemned to be hanged, and ask Judgment, whether during the attainder, they ſhould anſwer to the felony, whereof they are condemned, or to any other: And this plea ſerveth where the Party condemned hath already forfeited, as much as he can forfeit; ſo that it is to no purpoſe to travel him any further. But in ſome ſpecial caſes, when there is ſome end of it, a Man already condemned, may be arraigned again

Co. 3. Inſt. f. 213. As if a Man attainted of felony, were guilty of Treaſon alſo, at the time of the felony committed, he may now be put to anſwer the Treaſon, notwithſtanding his Attainder of felony, becauſe the King thereby was entitled to have the forfeiture of all his Landes, of whomſoever they were holden. 1. *H.* 6. 5. Otherwiſe it is, if the Treaſon were committed after the Felony; or at the leaſt,

leaſt, if it were after the Attainder had of the felony, for then the Title veſted in the Seigniours, beforethe Kings Title, might not be deviſed by matter accruing *ex poſt facto*: but if a Man be attainted of Treaſon, he cannot be after attainted of a former Treaſon. *v. Cro. 2. part.* Sr Walter Rawleighs *Caſe*: 495.

But the Queries may be,

Qu. 1. *Whether in divers Appeals of Robbery againſt one Perſon, he ſhall be attaint at every one of their Suits?*

Reſp. It is anſwered, that if divers Men have divers Appeals of Robbery againſt one, to the end that every Man may have again his goods, wereof he was robbed, by making freſh Suit, he ſhall be attaint at every one of their Suits. *The Womans Lawyer lib. 5. ſect. 13.*

Qu. 2. *Whether an Appeal of Robbery doth lye for a Robbery done before the felony, of which the Party was attainted?*

Reſp. It is anſwered, that the Party may have his Appeal of Robbery, for a Robbery done before the felony, whereof he was attainted; becauſe in the Appeal he is to have Reſtitution of his goods, beſides Judgment of death. *Co. 3. Inſt. f. 213.*

Qu. 3. *Whether a Man attainted of Petit Larceny, can be after attainted of Felony?*

Reſp. It is anſwered, If a Man be attainted of Petit Larceny, he may be attainted of felony, for the which he ſhall have Judgment of death, becauſe it is an higher offence, and is to have another Judgment. *Ibid.*

Qu. 4. *Whether a Man attainted of felony,*

and pardoned, ſhall anſwer at the Kings Suit, to other felonies committed before, and whereof he was not indicted at the time of the Attainder?

Reſp. It is anſwered, that *per aliquos videtur quod ita*, as well as at the Suit of the Party in an Appeal, yet ſome held otherwiſe, 10. *H.* 4. That a Man can die but once at the Suit of the King, and he that is pardoned, is as a New Man, all Judgments, as againſt the King, being determined.

But note, If a Man be adjudged to his Penance of Paine, *Fort*, and *Dure*; yet he may be impeached for any former felony, becauſe the Judgment is not given for the felony, but for his Contumacy.

Dyer 14. *Eliz.* 308. *Cobhams* Caſe.

2. Auterfoitz acquit.

This Plea the Common Law doth allow, becauſe it commandeth, that a Mans life ſhould not be put in *Jeopardy* twice for one, and the ſame offence. But then the Acquital muſt be of the very ſame offence, or elſe his Plea is to no purpoſe: Therefore if two Men be indicted of felony as principals, and afterwards by another Indictment, it is found, that one of them did the felony, and the other did felonioufly receive him, after the felony committed; he that is ſecondarily indicted, and arraigned as acceſſary, ſhall not be diſcharged, by pleading arraignment, and acquital upon the firſt Indictment, for the offence is not ſuppoſed the ſame, and one, but committed

committed at divers daies, 27. *Aſſ. Pl.* 10. And this for Acceſſaries after the felony: But when felony is done by force of Commanding, and procurement of another, he that ſhall be arraigned as Acceſſary, may plead that he was acquit, *&c.* though it were as principal, and the offences were at divers daies; for *vulnus, præceptum & factum, ſunt quaſi unum factum.*

Note, in an Indictment or Appeal of death, if it be found that he killed him in his own defence, he is acquited of the felony for ever. Co. 3. Inſt. f. 213, & 214.

3. Auterfoitz convict de meſme le felony devant Judgement.

If a Man commit murder, and be indicted, convict, or acquitted of Man-ſlaughter, he ſhall never anſwer to any other Indictment, of the ſame death, for all is one; and the ſame felony for the ſame death. Co. Lib. 4. *Holecyoſts* caſe.

Wetherel brought an Appeal againſt *Darby* of murder, the Defendant pleaded *Non culpable*, and was found guilty of Man-ſlaughter, and had his Clergy; afterwards he was indicted of murder, and upon it arraigned at the Kings Suit, and he pleaded the former conviction in the Appeal at the Parties Suite, and it was adjudged a good Barre, ad thereupon diſcharged, for this was a good Barre at the Common Law, and reſtrained by no Statute, and the reaſon is, becauſe the Life of Man ſhall not be put twice in *Jeopardy* for the ſame offence. Co. lib. 4. fol. 40. a.

4. Auterfoitz convict d'un auter felony.

Before the Statutes of Qu. *Eliz.* c. 4. and 18. *Eliz.* c. 6. If a Man had committed divers felonies, if he had been indicted of the laſt, and had the benefit of his Clergy, he could not have been impeached for any of the former felonies; albeit for the ſame he could not have had his Clergy: by the Act it is provided, that notwithſtanding the allowance of ſuch Clergy, he may be impeached for any former offence, for which he could not have had his Clergy.

5, *and laſt*, Auterfoitz attaint de meſme le offence.

Auterfoitz attaint of the ſame felony, was a good Plea, as well in an Indictment, as in an Appeal at the Common Law: But by the Stat. of 3. *H.* 7. c. 1. in an Appeal of death, at the Suit of the Party, auterfoitz attaint de meſme le mort, is no Plea at this day: But in caſe of an Indictment of death at the Suit of the King; auterfoitz attaint de meſme le mort in Appeal is a good Plea.

Co. 3. Inſt. 213.

Auterfoitz attaint de murder, is a good Plea to an Indictment, &c. of Petit treaſon of the ſame death; for in effect it hath the ſame Judgment, and the ſelf ſame forfeiture.

Co. 3. Inſt. f. 213.

So likewiſe a Man may be attainted of Man-

Man-ſlaughter, it is a good barre to an Indictment of murder of the ſame death, and *e converſo*.

Thus much of matters Judicial in criminal offences, I go on now (according to our firſt propoſed Method) to the Acts Judicial.

8. *Of Judicial Acts, relating to publik Crimes.*

Touching theſe Judicial Acts, there are worthy of conſideration theſe particulars.

The manner how Cauſes criminal are brought to Tryal. 2. The Judgment or Sentence upon that Tryal or Arraignment. 3. The Execution of that Sentence. 4. The means whereby the Judgment or Execution may be eſcaped, or delayed.

No Man is ſaid to be arraigned, but meerly at the Suit of the King, upon an Indictment found againſt him, or other Record, wherewith he is charged. And there the Arraignment of the Priſoner is to take order, that he appear, and for the certainty of the Perſon, to hold up his hand, and to plead a ſufficient plea to the Indictment, or other Record; whereupon they which follow for the King may orderly proceed. 1. *The manner of Arraigning a delinquent.* Co. Litt. 263. a.

If the party accuſed of Treaſon or Felony, &c. do at his Arraignment before the Judge deny the offence; or as we ſay, plead Not-guilty, then ſhall he be tryed by a Jury of 12

Men, dwelling nigh to the Vill, where th offence was comitted, ſuch Men as to the Party accuſed be nothing allyed, to certify the Judge upon the truth of the fact: which at their appearance, the Party arraigned may challenge peremptorily upon his own diſlike, without ſhewing any cauſe, *in favorem vitæ*, the number of twenty in murder, and other Felony: And in caſe of High treaſon, Petit treaſon, and Miſpriſion of treaſon, he may challenge to the number of 35: And if he challenge peremptorily above 35 in caſe of Treaſon, or Petit treaſon, he forfeiteth his goods, and Judgment of pain, fort and dure ſhall be given againſt him, as one that refuſeth the Tryal of Law, by challenging 3 full Juries.

Co. Litt. 156. b.

Co 3. Inſt. f. 227 & 228.

Otherwiſe in caſe of Felony, for no Law giveth forfeiture for challenging above twenty; but the Court is to over-rule the Challenge.

Co. Litt. 156. b.

But note, that in caſe of Treaſon or Felony, the Party arraigned may challenge for juſt cauſe, as many as he can.

2. But if the Party upon his Arraignment, in caſe of Felony, refuſe to anſwer, according to Law, or ſay nothing, he ſhall not be Judged to be hanged, but for his contempt, he ſhall undergo pain, fort and dure, which makes no Attainder for the felony, nor forfeiture of his Lands, nor corruption of Blood: Otherwiſe in caſe of High treaſon; for if the Party refuſe to anſwer according to Law, or ſay nothing, he ſhall have ſuch Judgment by Attainder, as if he had been convicted by Verdict or Confeſſion.

Co. Litt. 391. a.

Co. 3. Inſt. 14, & 217.

3. If

3. If the Party arraigned be found Guilty by Verdict or Confeſſion, then he is ſaid to be convicted, which is before he hath Judgement or Sentence; and thereupon he doth forfeit his goods and Chattels. Co. Litt. 391. a.

But note, that the begging of the goods or Eſtate of the Delinquent, indicted of any Treaſon, Felony or other offence, before he be convicted and attainted is utterly unlawfull, becauſe before Conviction and Attainder nothing is forfeited to the King, nor granted by him. Co. 2. Inſt. 48. Co. 3. Inſt. 17 & 229.

And beſides it either makes the Proſecution more violent and undue, then quiet and equal proceeding of Law and Juſtice would permit; or elſe by under hand Commiſſion and agreement, hinder the due courſe of Juſtice, for examplary puniſhment of the offender. Co 3. Inſt. 229.

Note further, that before Indictment, the goods or other things, of any criminal cannot be ſearched, Inventoried, or in any ſort ſeiſed, nor after Indictment ſeiſed and removed, or taken away, before Conviction, or Attainder. 2. *Of the Judgment or Sentence pronounced.*

Thus much of the manner touching the Arraignment of a Delinquent.

Aſſoon as Judgment, or Sentence is pronounced by the Judge, the Party arraigned is ſaid to be attainted, **mort en Ley**: But though the Delinquent by the Attainder be a dead Perſon in Law, yet maugre the Attainder, his Body may at the Suit of a Subject be taken in execution, upon a Judgment or Stat. Co. 2. Inſt. f. 215, 213.

Cro. 1. part. *Ognell, v. Paſton.* *dict.* And he may be executed for Treaſon, or felony, notwithſtanding ſuch Execution had againſt him.

Cro. 1. part. *Truſſel's Caſe.* As to Attainder, take theſe Queries, together with Solutions.

Qu. 1. *Whether there be a diverſity betwixt an Attainder and an Entry into Religion?*

Reſp. There is a great difference between an Attainder of treaſon or felony, and an Entry into Religion; for he that is attainted of treaſon or felony, hath capacity, and may purchaſe Lands to him and his Heirs; but ſo cannot he that is entered into Religion.

Co. 3 Inſt. *f.* 219.

Qu. 2. *When a felony is perpetrated, whether there be a Diſcrimination in Law betwixt purchaſing of Lands before, and after Attainder?*

Reſp. If a Man commit felony, and after purchaſe Land, and then is attainted, he has capacity to purchaſe, but not to hold it, for in that caſe the Lord of the fee ſhall have the Eſcheat: But if a Man attainted of felony purchaſe Lands, in this caſe the King ſhall have it by his prerogative, and not the Lord of the fee; for a Man attainted hath no capacity to purchaſe, but only for the benefit of the King.

Co. Litt. *f.* 2. *b.*

Qu. 3. *Whether a Perſon attainted after a Pardon, can have an Action of Battery, &c. committed before the Pardon?*

Reſp. If a Perſon be beaten, or maimed, or a Woman attainted, be ravithed, after Pardon, they ſhall have an Action of Battery, Appeal of Maime, or Rape.

Co. 3. Inſt. 215.

It is

It is to be known, that there be two manner of Attainders; the one after appearance, and that in 3 manners: by Confeſſion, by Battel or by Verdict, the other upon Proceſſe to be outlawed, which is an Attainder in Law: But upon every one of theſe Judgment ought to be given, otherwiſe it ſhall not be ſaid an Attainder. Co. Litt. 390. b. Perkins ſſ. 27.

Now, as upon conviction a Delinquent forfeiteth his good and Chattels; ſo upon Attainder, that is by Judgment given, his Lands and Tenements are forfeited: But touching the forfeiture of Lands, there is a diverſity betwixt an Attainder of felony, by outlawry upon an Appeal, and upon an Indictment; for in the caſe of an Appeal of death or other felony, Proceſs being awarded againſt the Defendant, and hanging the Proceſs the Defendant conveyeth away the Land, and after is outlawed, the conveyance is good, and ſhall defeat the Lord of his Eſcheat: But if a Man indicted of felony, and hanging the Proceſs againſt him, he conveyeth away the Land, and and after is outlawed, the conveyance ſhall not in that caſe prevent the Lord of his Eſcheat, For in the caſe of the Appeal, the Writ containeth no time, when the felony was committed; and therefore the Eſcheat can relate, but to the outlawry pronounced; but the Indictment contriveth the time, when the felony was committed; and therefore the Eſcheat upon the outlawry ſhall relate to that time. Co. Litt. 390. b, & 13. a, b.

But note, that in caſe of an Indictment, there

there is alſo a difference obſerved; for (as hath been ſaid) it ſhall refer to the time alledged in the Indictment for avoiding of Eſtates, Charges and Incumbrances made by the Felon, after the perpetration; but for the mean profits of the Land, it ſhall relate only to the Judgment, as well in the caſe of outlawry, as in other Caſes.

Co. Litt. 390. b. Plowd. Com. f. 488. b.

There is a Queſtion raiſed in the Caſe betwixt *Groſſe* and *Gayer*; *viz.* Whether an Attainder to a *præmunire*, ſhall have relation to the offence for the forfeiture of his Lands, or only to the time of the Judgment pronounced: But the Judges did give no Reſolution of it, being a point of difficulty:

Cro. 3. part. f. 172 & 173.

Perkins ſect. 29.

Note; All the Attainders, as to Goods and Chattels, ſhall have relation but unto the Judgment given; ſo that a gift, *&c.* made of ſuch Goods, by a Felon before the Judgment, is good.

Touching Alienations by a Criminal, the Civil Law ſays thus:

D. 39. 5. 15.

Poſt contractum capitale Crimen donationes factæ non valent ex conſtitutione Divorum Severi & Antonini.

D. 39. 6. 7.

Si quis mortis cauſa donaverit, & pœna ſecutus fuerit capitis affectus, removetur donatio ut imperfecta, quamvis cæteræ donationes ſine ſuſpitione pœnæ factæ valeant.

Having ſhew'd the Law touching Alienations, I ſhall preſent to the Reader's view the things imply'd at this day, both in the Judgment of Treaſon and Felony.

1. *In*

1. *In the Judgment of High Treaſon.*

In the Judgment relating to *Crimen læſæ Majeſtatis*, is imply'd at this day,

Firſt, the forfeiture of all the Traitors Manors, Lands, Tenements, and Hereditaments, in Fee ſimple, or in Fee Tayle, of whomſoever they be holden. Co. 3. Inſt. 211. Co. 3. Inſt. 19. 26. H. 8. c. 13. 33. H. 8. c. 20. 5. & 6. E. 6. c. 11.

Alſo of Rent-Charges, Rents ſeck, Commons, Corodys, and other Hereditaments, which are not holden, for in caſe of High treaſon, the Tenure is not material.

Alſo of Uſes, Conditions (unleſs inſeparably knit to the Perſon) of Rights of Entry, of Lands in the Right of the Wife, during the Coverture; of the profits of Land, which the delinquent hath for life, during his life; of truſts in Chattels Reals; but not of Freehold. *Cro.* 2. *part f.* 512. *Pl.* 23. *vid. Anderſons Reports, Inglefeilds Caſe, Co. lib.* 12. *f.* 6. *Dyer* 288. *b*, & 289. *a*. 33. H. 8. c. 20. 5. E. 6. c. 11. Co. *lib.* 7. *Inglefields* Caſe.

Note, that Rights of Actions, where the Entry is taken away, are not forfeitable.

Secondly, his Wife to loſe her Dower.

Thirdly he ſhall loſe his Children, for they become baſe and ignoble.

Fourthly, he ſhall loſe his Poſterity, for his Blood is ſtained and corrupted, and they cannot inherit to him, or any other Anceſtor.

Fifthly, all his Goods and Chahttels are forfeited, *&c.* and reaſon is (ſays *Coke*) his Body, Lands Goods, Poſterity, *&c.* ſhould be torn, pulled

pulled asunder, and destroy'd that intended to tear and destroy the Majesty of Government.

2. *In Judgement of Felony.*

A felon impliedly is punished in these particulars.

Co. Litt. f. 41. a. 392. a, b. Co. 3. Inst. 47.

1. He doth lose his Children, that they shall become base and ignoble.

2. He shall lose his Posterity, for his blood is stained and corrupted, that they cannot inherit unto him, or any other Ancestor.

3. He shall forfeit all his Lands and Tenements, which he hath in Fee, and which he hath in taile, during his life.

4. All his Goods and Chattels.

Note, that before the Stat. 1. E. 6. c. 2, & 5. E. 6. c. 11. the Wife of a Person attainted of Misprision of treason, Murder or Felony, losed her Dower; but since she is dowable by these Statutes. Hitherto of the Judgment or Sentence it self.

3. *Execution of the Judgment pronounced.*

In doing of Execution, both in Treason and Felony, two things are worthy of the Reader's notice.

Co. 3 Inst. f. 52. 211. 212.

1. That it be done by the right Officer, as the *Sheriff* or *Marshal*, for if any other execute offendours it is felony.

Execution must be made by the *Sheriff* or *Marshal*, according to the Judgment: for it is a maxime in the Law of *England*, *Non alio modo puniatur quis quam secundum quod se habeat Condemnatio.*

Punish-

Punishment may be avoided or escaped, in part or totally, either

1. By the means of Justice, as
   - By Writ of Error,
   - or
   - Falsifying the Attainder.
2. By the means of Mercy, as
   - By the Kings Pardon,
   - or
   - By Restitution: of these in their order.

4. Of the means by which the Judgment or Execution may be avoided in part, or in all.

2. *Of Writs of Error.*

If the Judgment be erronious, both the Judgment and Execution thereupon and all the former proceedings shall be reversed by Writ of Error: but if the the former proceeding, and the Execution be erronious, the Execution only shall be reversed.

2. *Of Falsifying Attainder.*

To falsify in Legal understanding is to prove false, that is to avoid, or to defeat the Attainder, in Latin *Falsare, seu falsificare, falsum facere.* Co. 3. Inst. f. 210.

Whereseever the Judgment is void, or *coram non Judice*, the party is not driven to his Writ of error; but may falsify the ttainder by Plea, shewing the special matter, which proveth it void, or *coram non Judice*: In which case the Party forfeiteth neither Lands, nor Goods. Co. 3. Inst. f. 231.

If a Man committeth Treason, or felony and is

is thereof attainted in due form of Law, and after this Treaſon or Felony, is pardoned by a general Pardon, hereby the foundation is ſelt, *viz.* Treaſon or Felony, being by Authority of *Parliament* is diſcharged & pardoned; the Attainder (being builded thereupon) cann't ſtand, but may be ſatisfy'd and avoided by Plea, for he hath no other Remedy by Writ of error, or otherwiſe.

Dyer 20. *Eliz.* 135. Co. Lib. 6. *f.* 13 & 14 *in Arundels* Caſe.

If *A*, be indicted before the Coroner for the death of another, and that *A*, fled for the ſame, hereby are all the Goods and Chattels of *A*, forfeited, which he had at the time of the Verdict given: and this cannot be falſified by Traverſe. If the Party be arraigned upon the ſame Indictment before Juſtices of Gaol delivery, and is by Verdict acquitted of the Felony, and that he did not fly for the ſame; yet he ſhall forfeit his Goods and Chattels: But ſuch a *fugam fecit* may be ſatisfy'd by matter in Law; for if the Indictment be void or inſufficient, there is no forfeiture.

Co. 3. Inſt. *f.* 233.

Co. Litt. 373. *b.*

3. *Of Pardons.*

Touching Pardons, theſe particulars are worthy of obſervation.

1. *The Etymology of the word* Pardon, Co. 3. Inſt. *f.* 233.

Pardon in Latin is called *Perdonatio*, which is derived *a per* and *dono*: *per* is a Prepoſition, and in the *Saxon* Tongue for is *orvor*: as to forgive is throughly to remit, and fore-think is to repeat, & forbear is to bear with patience.

A Pardon is a work of Mercy, whereby the King doth remit, or forgive a felonious offence,

offence, perpetrated againſt his Imperial Crown, either before Attainder, or Conviction, or after.

2. *The Deſcription of a Pardon.*

A Pardon (ſays one) is twofold; one *ex gratia Regis*, the other per Courſe del Ley, by Courſe of Law. Pardon *ex gratia*, is that which the King in ſome ſpecial regard of the Perſon, or other circumſtance, ſheweth or affordeth upon his prerogative Royal or power. Pardon by courſe of Law, is that which the Law in equity affordeth for a light offence, as Homicide caſual, when one killeth a Man having not ſuch meaning. *Weſt. Part. 2. Symb. Tit. Indict. ſect. 46.*

3. *The Diviſion of Pardons.*

All Pardons of Treaſon or Felony (ſays *Coke*) are to be made by the King, and in his Name only; and are either general, or ſpecial: All Pardons either general or ſpecial, are either by Act of Parliament (whereof the Court in ſome Caſes ſhall take notice) or by the Charter of the King (which muſt always be pleaded:) And theſe again are either abſolute, or under Condition, Exception or Qualification.

General Pardons are by Act of Parliament, and if any of theſe Pardons be general and abſolute, the Court muſt take notice of them, though the party plead it not, but would waive the ſame.

Co. 3. Inſt. f. 234.

No particular Pardon, be it at the Coronation or any other, or any offence or offences whatſoever, that is abſolute without any condition, *&c.* need any Writ of Allowance; but when the Pardon is conditional by force of the

4. *The Allowance of Pardons.*

Act

Co. 3. Inst. f. 234, 235. Act of 10. E. 3. c. 2. there a Writ of Allowance out of *Chancery*, testifying that the Condition is performed, *viz.* surety found according to that Act, may be had, or the Party may plead the finding of Surety, *&c.* and vouch the Record.

Touching Allowance of Pardons, I shall mention two Cases out of *Crokes* Reports.

Cro. 3. part. Mints his Case. First, upon the 14 day of *November* 1640, Sir *Matthew Mennes*, Knight of the *Bath* (who was convicted of Man-slaughter, and had his Clergy and his burning in the hand was respited: and now he pleaded his Pardon, whereby the burning in the hand, and all other Felonies committed by him, *& alia malefacta*, before 8*th* of *July* last were pardoned: and there was an especial Clause, that he should not find Suretys for his behaviour, and the Pardon bore date 31 of *Octob.* last. And although there were many misdemeanors by him after the said 8*th* of *July*, for which he deserved to be bound to the good behaviour, yet he had his Pardon allow'd, and was discharged from finding Suretys, *&c.*

Cro. 1. part. Linley's Case. Secondly, Sir *Henry Linley*, who was indicted of Treason, being brought to the Bar, and demanded, whether he could say any thing why the Court should not proceed upon the Indictment, which was before Commissioners of *Oyer & Terminer*, he produced the Queens Pardon, without any Writ of Allowance thereof. And *Pope Second* Clerk of the Crown, inform'd the Court, that the Presidents were, that in case of Treason, it was used to allow of the Pardon;

but

but not in Felony, whereupon the Pardon was allowed.

Thus much of Pardons.

4. *Of Reſtitutions.*

All that is forfeited to the King by any Attainder, &c. he may reſtore by his Charter, But if by the Attainder the Blood be corrupted, that muſt be reſtor'd by Authority of *Parliament*: and the reaſon wherefore the King may by his Charters pardon the Execution, and reſtore the Party or his Heirs to the Lands forfeited by the Attainder, and remaining in the Crown, is for that no Perſon hath thereby any prejudice, but to make reſtitution of his Blood, the King cannot do it, but by Act of *Parliament*, becauſe it ſhould be to the prejudice of others.

And the Rules are,

Non poterit Rex gratiam facere cum injuriâ, & damno aliorum.

Quod alienum eſt, dare non poteſt Rex per ſuam gratiam.

Quacunque forma Priuceps alienat, ſalvum manet Jus tertii.

Aliorum honores, aliis damnorum occaſionem fierinon oportet.

Note; Of Reſtitutions by *Parliament*, ſome be in Blood only, (that is to make his Reſort as heir in Blood to the Party attainted, and other his Anceſtors, and not to any Dignity, Inheritance of Lands, &c.) and this is *Reſtitutio ad tempus, ſecundum quid, ſeu in partem.* And

some be general Restitutions, to Blood, Honours, Dignities, Inheritance, and all that was lost by the Attainder; and this is *Restitutio in integrum*; and *Restituere* (generally) *nihil aliud est, quam in pristinum statum reducere.*

24. 3. Inst. c.

Thus now, concluding this slender Treatise with the Kings Mercy, that is convey'd to his Subjects by Pardons and Restitutions, I humbly apply to our most Gracious Soveraign the words, which *Seneca* did once intimate to the *Roman* Emperor §.

Occidere contra Legem nemo potest: servare nemo præter te.

The

The Author hath written ſomewhat (touching the Statutes of Hue and Cry, *for the better and more ſpeedy apprehenſion of ſuch as are guilty of Robberies) which ſhould have been placed before under the Title of Robbery; but it being by ſome inadvertence there omitted, the Printer has thought it not much amiſs to put it at the end of this Diſcourſe, by way of Appendix. And thus the Author treats concerning the Statutes of* Hue and Cry.

BY the Statutes of 13. *E.* 1. of *Winton*, *c.* 1. 28. *E.* 3. *c.* 11; and 28. 1. *c.* 17. the Country ſhall anſwer, if the Robbers be not taken. 13. *E.* 1. *c.* 1.

By the Statnte of 27. *Eliz. c.* 13. are enacted theſe particularities §. 27. *Eliz. c.* 13.

1. That the Inhabitants of a hundred ſhall be chargeable with the moyety, where a freſh Suit ſhall ceaſe.

2. That the Clerk of the Peace ſhall proſecute the Suit: which Suit commenced, ſhall not ceaſe upon the death, or remotion of the ſaid Clerk of the Peace.

3. A Remedy for thoſe, againſt whom the Recovery and Execution is had, to have Contribution.

4. That there ſhall be no penalty, where any of the offenders be apprehended.

5. The Suit ſhall be commenced within one year next, after ſuch perpetration, or Robbery, or elſe the Perſon, or Perſons robbed, ſhall not take any benefit by vertue of any of the ſaid former Laws or Statutes.

6. That the Party robbed muſt give notice and intelligence of the Robbery committed unto ſome of the Inhabitants of ſome Town, Village, or Hamlet near unto the place, where any ſuch Robbery ſhall be committed.

7. That the Party robbed ſhall not have any Action, upon any of the Statutes aforeſaid, except he ſhall firſt within twenty days next after ſuch Action to be brought, be examined upon his Corporal Oath before ſome Juſtice of Peace of the County where the robbery was committed, whether he doth know the Parties that committed the Robbery, or any of them; and then ſhall become bound to proſecute the offenders.

Having given a ſummary of theſe Statutes upon Hue and Cry, I ſhall preſent to the Reader ſeveral Reſolutions given at the Courts of *Weſtminſter*, upon the Statute of *Wincheſter*, and the Stat. of 27. *Eliz.* The former, you muſt kow, gives penalty and Remedy, the latter ſhews how the Examination ſhall be, and in what time before the Action brought.

1. *Reſolves on the Stat. of* Winton.

A Robbery for which the hundred muſt anſwer by force of the Statute of *Winton*, is to be done openly; ſo as the Country may take notice thereof themſelves: but a robbery done ſecretly in the Houſe, the Country cannot take notice thereof, for every one may keep his houſe as ſtrong as he will at his peril; for it was adjudged in *Aſhpoles* Caſe, that the Party robbed needed not to give notice thereof to the Country; for it may be the Party robbed was bound, or Maimed, *&c.* ſo as he could not make Hue and Cry to give notice. Co. Lib. 7. *Sendills* Caſe *f.* 6.

A Robbery was done in *January* preſently after the Sun-ſetting, during day light; and it was adjudged, that the hundred ſhall anſwer for the ſame, for it was convenient time for Men to travel, or to be about their Buſineſs. Ibidem.

A Robbery was done in the Morning, *ante lucem*, the hundred ſhall not be charged. Co. Lib. 7. *Milbornes* Caſe.

It was held by *Anderſon*, and all the Juſtices that whereas the Stat. of *Wincheſter* ſpeakes of Robberies done in the day, before night; yet if a Robbery be committed in the Morning before day, or in the Evening after the day, in any time of the night, in which Men uſe commonly to travel, that the hundred is anſwerable for it; but if it be at twelve or one of the Clock in the night, at which time every one is intended to be in bed, the hundred is not anſwerable for the Robbery. Cro. 1. part. *Ridgeley*, v. Hundred of *Warrington* 70.

Cro. 2. part. *May*, v. Inhabitants of Hundred *de Morley* 106.

The Jury found, that the Robbery was done *poſt lucem ejuſdem diei, & ante Solis ortum, Anglice*, After day-break, and before Sun-riſing; and upon this the Court adviſed, and Judgement was given for the Plaintiff, and a Preſident ſhewn *Paſch.* 28. of *Eliz. Rot.* 130. where the Robbery was done *poſt occaſum Solis, & per diurnum lumen*; *Anglice*, day light, and there adjudged for the Plaintiff.

Cro. 1. part. *Anonymus* 753.

If an houſe be robbed in the day; and the Felons eſcape, Hue and Cry being made, whether the hundred ſhall anſwer for that Robbery, by the Stat. of *Winton? Gawdy* and *Popham* conceived, that the hundred ſhall not be charged: For the Stat. of *Winton* extends only to Robberies done to the Perſon: And was principally made for ſafeguard of travellors. But every one ought to keep his own houſe at his peril; for it is his Caſtle, and no other ought to meddle there: & therefore it is not reaſon, that any ſhould be charged, if he be robbed there.

Cro. 2. part. *Wait*, v. Hundred of *Stoke* f. 496.

Robbery done on a Sunday ſhall be chargeable to the Country.

2. Re-

2. *Reſolves on the Stat. of* 27. Eliz.

By the Stat. of 27. *Eliz.* c. 13. none ſhall have Action upon the ſaid Statute, except the Parties robbed, ſo ſoon as he may give notice of the ſame to any of the Inhabitants of any Village, Town, or Hamlet, next to the place where the Robbery was done, and if they in purſuit apprehend any of the offenders, that will excuſe the Town. Co. Lit. 7: f. 6. Sendall's Caſe.

Action upon the Statute of *Winton*, for that one *Brook* his Servant was robbed; and alledges that the Plaintiff himſelf came before a Juſtice of Place, and was ſworn according to the Stat. of 27. *Eliz.* And after Verdict, it was alledged in Arreſt of Judgement, that the Servant was to be ſworn, and not the Maſter; and ſo was the opinion of the Court: For the Servant might know the Perſons, when the Servant was robbed, and the Maſter was not in company: and the Intent of the Stat. is, that he that had notice, ſhall be ſworn, and thereupon Judgment was ſtaid. Cro. 1. part. *Greenscaſe* f. 142.

Action upon the Stat. of *Winton*, whereas one *Palmer*, the Plaintiffs Servant was robbed within the hundred of 68 pounds, by Perſons unknown, and had made Hue and Cry, according to the Stat. and one of the Thieves were taken, and the ſaid *Palmer* had made oath before ſuch a Juſtice of Peace, of the ſaid County next adjoyning to the ſaid hundred within 20 daies, before this Action brought, that Cro. 2. part. *Raymond*, 1. Hundred *de Oking* 37, & 38.

he did not know any of the Parties, who robbed him, that the said hundred had not made him any recompense. And upon Not-guilty pleaded, and tryed at the Bar this Terme, and found for the Plaintiff, it was moved in Arrest of Judgment, that this Action lyes not, because the Plaintiff himself was not sworn, that he knew not any of the Parties, who did the Robbery; for it is not sufficient, that the Servant who was robbed was sworn, for by the Statute of 27. *Eliz.* the Party who brings the Action ought to make that Oath, and it was argued, that the Servant who was robbed ought to have brought the Action, and then his Oath would have been sufficient: But when the Master brings the Action, he himself ought to be sworn, that he knew not any of the Robbers, otherwise he might not bring it; and therefore the Action lyes not. But it was resolved by the Court, that the Action well lyes for the Master, and that the Servants Oath was sufficient, for it is properly in his notice, that he was robbed, and did not know any of the Robbers, and the Master knows it not that he was robbed, or who were the Persons, but by the report of his Servant; and it would be inconvenient, if the Master should not bring the Action, but the Servant might release, or compound or discontinue the Suit, and so the Master should have the loss by his falshood; therefore the Master shall bring the Action, and have his Servant, who was robbed, be his witness: whereupon it was adjudged for the Plaintiff.

Action

Action upon the Stat. of Hue and Cry, ſuppoſing that he was robbed in ſuch a High way, *in diviſis Hundredorum*, and that he gave notice thereof to the Inhabitants of the Hundred near to the Place where he was robbed. After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that this declaration is not good, becauſe he doth not ſhew, that the High way is within any Hundred. And in truth, it out to be given to the Inhabitants of both Hundreds, and ſo be divers Preſidents that notice was given in the other Hundred, to the Inhabitants of that hundred: *Sed non allocatur*; wherefore it was adjudged for the Plaintiff.

Cro. 2. part. *Foſter, v. Inhabitantes Hundredorum de Spthar f.* 675.

Hue and Cry made in the next Vill adjoyning, though it were in another County, is good enough: for a Stranger cannot know the diviſion of Countys.

Cro. 3. part. *Tutter, v.* Inhabitants of *Daccerar.*

Vide Cro. 3. part. Merrik. v. Hundred. de Rapeſgate 379.

Action upon the Stat. of *Winton* of Hue and Cry, and ſhews in his Count the ſaid Statute, and that ſuch a day he was robbed of ſo much within that Hundred; and that he made Hue and Cry: and ſhews according to the Statute of 27. *Eliz.* And that within 40 days before the Action brought, he was ſworn before ſuch a Juſtice of Peace, that he was robbed of ſo much, and did not know any of the Felons; & that as yet the Defendants had not taken any of the Felons, nor ſatiſfy'd him *contra formam Stat. prædict. unde Actio accrevit.* After Verdict for the Plaintiff, it was moved that

Co. 2. part. *Andrews, v.* Hundred of *Lewknour* 187.

that this Declaration was not good, becauſe the Action is founded upon two Statutes, and both mentioned in the Declaration; yet he concludes, *contra formam Statuti prædicti*, which is not good; and the Court thereupon doubted, and appointed Preſidents to be ſearched; and after divers Preſidents of this Court, and the *Common Bench* ſhewn unto them, wherein ſome were *Contra formam Stat. prædicti*, and ſome *Statutorum prædictorum*: And the Court held that the beſt forme was *Statuti prædicti*. For the Action was grounded only upon the Statute of *Winton*, which gives penalty, and remedy (the other ſhews only how the Examination ſhall be, and in what time before the Action brought, otherwiſe he ſhall not have the Action) and *Statuti prædicti* refers only to the Stat. of *Winton*, which gives the Action therefore the beſt form to declare is *Contra formam Statuti prædicti*.

Thus much of the Statutes touching Hue and Cry.

FINIS.

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